Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

LA SOCIETE GENERALE IMMOBILIERE AND LSGI, INC.,
Petitioners,

v.

THE MINNEAPOLIS COMMUNITY DEVELOPMENT AGENCY AND THE CITY OF MINNEAPOLIS,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's reasoning in *Griffin* v. *United States*, 502 U.S. 46 (1991), upholding a jury's general verdict even though one of the two grounds for the criminal count was unsupported by sufficient evidence, applies with equal force to general verdicts in civil cases.

2. Whether a jury's general verdict of breach of contract, supported by evidence of various breaches, can be reversed without a remand for retrial if some, but not all, of the factual grounds submitted to the jury lack sufficient evidentiary support.

DISCLOSURE STATEMENT PURSUANT TO RULE 29.1

La Societe Generale Immobiliere is a subsidiary of Sertagex. LSGI, Inc. is a subsidiary of La Societe Generale Immobiliere. La Societe Generale Immobiliere has two other subsidiaries, CPH, S.A. and SCC, S.A. All of these companies are privately held.

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PETITION FOR A WRIT OF CERTIORARI

La Societe Generale Immobiliere and LSGI, Inc. (collectively "petitioners" or "LSGI"), hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 44 F.3d 629 and is included in the Appendix at 1a-22a. The order of the court of appeals denying rehearing is not reported and is included in the Appendix at 23a. The post-trial opinion of the district court is reported at 827 F. Supp. 1431 and is included in the Appendix at 24a-36a. The district court order denying the parties'

motions for summary judgment is not reported and is included in the Appendix at 37a-48a.

JURISDICTION

The decision of the court of appeals was entered on December 22, 1994. On February 17, 1995, the court of appeals denied LSGI's petition for rehearing with a suggestion for rehearing en banc. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT

A. Factual Background

Petitioners, one of Europe's most experienced and successful developers and its American subsidiary, spent more than three years and $3.2 million dollars developing what would have been one of the premier, state-of-the-art, shopping malls in the world ("the Project"), anchored by two of America's most prominent retail stores, Nordstrom and Neiman-Marcus. Petitioners undertook these efforts pursuant to a Development Agreement ("the Contract") with respondents, the Minneapolis Community Development Agency ("MCDA") and the City of Minneapolis (collectively, "the City"). The Contract granted petitioners exclusive rights to negotiate the development of the Project. RA.16 at 183.[1] The Project was to be built on the City's main shopping street, Nicollet Mall, in downtown Minneapolis. *Id.* at 180. Petitioners' "Preliminary Plans," approved by the City in early 1986, envisioned that the Project site would be covered by a glass atrium or "dome" and that traffic on Nicollet Mall would be rerouted under the Project through a tunnel. *Id.* at 184.

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[1] References to "RA. ——" refer to the appendices filed by the parties in the Eighth Circuit. References to "RB. ——" refer to the supplemental appendix filed in the Eighth Circuit on petition for rehearing.

Under the Contract, petitioners agreed to deliver within one year (the "contract year"), *inter alia*, "evidence reasonably satisfactory to the MCDA" that they had secured acceptable "anchor tenants." Contract § 3.01(a), RA.17 at 218. The City, in turn, agreed that if petitioners met their obligations it would, *inter alia*, acquire the property on which the proposed Project was to be built and lease it to petitioners for 99 years. *Id.* at 207.

To accommodate both petitioners' need for finality in the design of the mall (for marketing to prospective anchor tenants) and the City's indecisiveness as to certain minor aspects of the design (RB.70-71), the parties negotiated language providing that "prior to the final approval" of LSGI's plans, the City Council retained final design approval over the "treatment" of Nicollet Mall. Contract § 2.02, RA.17 at 216. To obtain "final approval" of its plans, the Contract required LSGI to submit "Proposed Project Plans" no later than 60 days prior to the end of the contract year. *Id.* at 215. The Contract specified that the City could reject the Proposed Plans *only* if they were "not in general conformance with the Preliminary Plans." *Id.* The Contract also stipulated that the Proposed Plans would be deemed approved, and construction could commence, if the MCDA failed to act on them within 15 business days. *Id.* at 216; see also App. at 10a n.2.

From its inception, the Project was opposed by certain politically influential downtown retailers who feared that an enclosed shopping "center" on the Mall would draw customers from their stores. RA.80 at 826-30. These retailers aggressively lobbied the Mayor, and enlisted his support for their cause. To assist these individuals, the Mayor, in addition to vetoing the unanimously approved original version of the Contract, established and hand-picked a Committee on the Future of Nicollet Mall to "advise" the City Council on the development of the Mall. *Id.* at 835-36. One City Council member called it "a set up committee." *Id.* at 838.

Nevertheless, petitioners and the City executed the Contract on November 3, 1986 after the City Council overrode the Mayor's veto. During the course of the contract year, petitioners diligently marketed the Project to prospective anchor tenants with the approved Preliminary Plans. RA.79 at 786. More than 60 days prior to the end of that year, petitioners—as required—submitted their "proposed Project Plans and Specifications" to the City. *Id.* at 792-93; RA.80 at 799-801. These plans, *as required by the Contract*, were in "conformance with" the Preliminary Plans and incorporated the dome-and-tunnel concept. Respondents took no action with respect to these plans during the subsequent 15-day period and thus they were "deemed" to be "approved" as "final" pursuant to the Contract.

By October 1987, petitioners had secured a firm commitment from Nordstrom to be an anchor tenant, as well as an expression of strong interest from Neiman-Marcus. RA.30 at 455. Petitioners also had secured the necessary financing for the Project. RB.27. As a result, the Executive Director of the MCDA recommended that the MCDA close the Contract. RA.83 at 919. Shocked opponents of the Project increased their lobbying efforts (RA.30 at 839; RA.18 at 388) and the Mayor summoned the director for a Sunday meeting to question him about petitioners' performance under the Contract. RA.83 at 919-20. Hours prior to the scheduled Closing on November 3, 1987, the final day of the contract year, the MCDA responded to the last-minute lobbying efforts by adopting the "Cramer Resolution," directing petitioners not to enclose Nicollet Mall and to keep traffic at grade. RA.80 at 830. Nevertheless, the City closed on the Contract, recognizing that petitioners had substantially complied with its terms and had delivered "evidence reasonably satisfactory to [the MCDA]" that it had secured two anchor tenants. RA.17 at 218. Among the documents executed at the Closing was a "Post-Closing Agreement" (RA.18 at 389) in which the parties agreed to

use their best efforts and to cooperate fully in order for petitioners to secure within 30 days "further evidence reasonably satisfactory to the MCDA" of Neiman-Marcus's commitment. RA.19 at 394.

For the next 18 months, the City repeatedly, through many separate and distinct acts, and in bad faith, made it impossible for LSGI to perform under the Contract and Post-Closing Agreement. Two days after the Closing, for example, the Mayor, "upset" that the MCDA had closed on the Contract, publicly denounced petitioners. RA.80 at 831-32; RA.82 at 905-06. As reported in the *Skyway News*, a local paper, he claimed that petitioners had misled the two anchor stores and stated that developers were untrustworthy. RA.53. He also sent a letter to Nordstrom in which he indicated that petitioners had deceived that company by failing to keep it fully informed. RA.36 at 541-42. The Mayor sent a similar letter to Neiman-Marcus. RA.37 at 545.

Despite these actions, on December 7, 1987, petitioners in an effort to comply with the Cramer Resolution, presented new plans to the City which abandoned the idea of an atrium and which kept traffic on Nicollet Mall at grade. RB.39 at 64. The City Council requested that petitioners produce a model of the new project ("Project 2") (RB.40 at 184), and resolved to allow petitioners more time to present this design. RB.41 at 68. The Mayor vetoed this action, but the Council overrode his veto. RB.42 at 71. Nonetheless, on January 20, 1988, the MCDA sent petitioners a surprise Notice of Default (RB.44 at 205), which was leaked to the press, further damaging petitioners' reputations and drastically complicating LSGI's efforts to secure a final commitment from Neiman-Marcus. RB.45 at 74, 78. The MCDA, however, encouraged petitioners to continue to invest in the Project by stating that the Notice of Default was nothing more than "contract maintenance." RB.46 at 73.

During the winter of 1988, petitioners continued in good faith to try to make Project 2 a reality. RB.48 at

183-85. They presented their new design model to Nordstrom and Neiman-Marcus, which continued to express interest despite misgivings about the City's political climate. RB.49 at 76. Respondents, however, finally destroyed any chance petitioners had of securing Neiman-Marcus's commitment to Project 2 by giving petitioners' competitor, Bell Canada Development, a $15 million subsidy to lure Neiman-Marcus to a competing site within the City. RB.50 at 81-83.

Petitioners and their architect, however, still hopeful of proceeding with Project 2 and of finding another anchor tenant, and relying on the City's good faith, presented their model for Project 2 to the City Council in March 1989. RB.51 at 185. This design was well received and the City Council resolved that petitioners should proceed. *Id.* The Council, however, gave petitioners only 30 additional days in which to secure two anchor tenants. RB.53.

Two weeks later, the City approved petitioners' design for Project 2, but the Mayor vetoed it, suggesting that the design was bad and questioning whether Minneapolis could support a project of this size. RB.56 at 94. On April 8, 1988, the City Council overrode the Mayor's veto. RB.57 at 95. On the same day, petitioners received one letter from the MCDA congratulating them on the approval of their new plans, and another letter from the MCDA stating that if petitioners wanted the Project to survive they would, again, need to redesign it. RB.58 at 96-100.

The City Council suspended the Post-Closing Agreement until August 1988 and pressured petitioners to reduce the scope of the Project yet again. RB.59 at 104. Between May and June, petitioners designed yet another project ("Project 3"), which excluded certain property known as the "614 Property." RB.60. On July 13, 1988, the City Council passed a resolution approving Project 3 and its financing. RB.61. Following the exe-

cution of a new development agreement, petitioners were to be given 10 months to secure one or more anchor tenants for Project 3. RB.62 at 114. Instead of closing on the promised development agreement, however, the City advised petitioners that they were in default and unilaterally terminated the Contract and Post-Closing Agreement in June 1989. RB.63.

B. Proceedings Below

1. In 1989, petitioners sued the City in the United States District Court for the District of Minnesota for breach of contract and deprivation of property without due process. Petitioners pointed to the Cramer Resolution as the first of many violations of the Contract. Petitioners *also* argued that the City violated its contractual obligations of good faith and fair dealing by engaging in a whole series of bad faith acts between the time of the Cramer Resolution and the time the Contract was terminated, in June 1989. RB.50, 58-59, 79. The district court, Judge Devitt presiding, denied the City's motion for summary judgment (App. at 37a-48a), finding that the Contract did not unambiguously grant the MCDA the right to adopt the Cramer Resolution and that other material questions of fact also existed as to petitioners' other claims of breach of the implied covenant of good faith and fair dealing. After a three-week trial before Judge Rosenbaum, the case was submitted to the jury on the theory that the City's *overall* course of conduct, including its violations of its obligation of good faith and fair dealing, constituted a breach of contract.[2]

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[2] Instruction No. 22 stated that "LSGI argues that it was prevented by the defendant from fully and completely performing the contract. . . . If you find that either party has unreasonably interfered with the contract, this would be a breach of the contract." RA.88. Instruction No. 17 stated that:

> The law implies in every contract a promise to act in good faith. In other words, any contract between the parties included an implied term imposing a duty of good faith and

The jury, on the basis of a verdict form which the City approved, returned a general verdict finding that the MCDA had breached the Contract. The jury awarded petitioners approximately $25 million in damages for lost profits and out-of-pocket expenses.[3] RB.1. The jury also found that in connection with its breach the City arbitrarily injured petitioners' reputation within the very small community of retailers with whom they worked and awarded petitioners approximately $9 million for that denial of due process in connection with the destruction of their contractual right protected under state law. *Id.* Both at trial,[4] and on post-trial motions,[5] Judge Rosen-

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fair dealing on the parties in the performance and enforcement of the contract.

RA.87.

[3] The jury's outrage at their own City's acts is manifest from respondents' post-trial pleadings which included a *Star Tribune* report from February 26, 1993: "For the federal jury that deliberated the case of [LSGI] the verdict was clear almost right from the start: The City screwed up. The jury . . . quickly concluded that the City broke its contract with the French development firm by not acting in good faith and by interfering with LSGI's attempts to respond to the City's shifting demands, according to three jurors . . . . Some jurors were disturbed by Mayor Don Fraser's political maneuvering and the heavy-handed lobbying . . . . [Others] thought the City Council was most to blame, telling LSGI one thing and then changing terms at the last minute. A couple of jurors at first wanted to award the full $67 million in damages [LSGI] wanted . . . . 'We felt there was overwhelming evidence that the City was at fault . . . . LSGI did everything the City asked, and the City still pulled the rug out from under them.'" RB.65.

[4] "Counsel, I will short circuit this one. That contract and that language is ambiguous. . . . [I]f it was plain and unambiguous, the mayor would not have felt so deeply committed to putting in further explanation." RB.3 at 73.

[5] "It is not at all clear to the Court that, on the 365th day of a one-year contract, the [City] could simply reject an approved design plan. Certainly a clause of this type could reserve finish or treatment details. But the overall design plan had been ap-

baum reaffirmed that the Contract was "patent[ly]" ambiguous. RA.4 at 5. The district court held that the damages awarded by the jury were supported by the evidence and that LSGI's reputation had suffered serious harm and it refused to disturb the jury's factual findings. *Id.* at 5, 9. Expressing concern, however, that the burden of the judgment would fall on the City's taxpayers rather than "on the official wrongdoers," the district court directed a remittitur of the jury award to $17.2 million. *Id.* at 13.[6]

2. Both the City and petitioners appealed. The Eighth Circuit did not address any issues raised on appeal except those dealing with or flowing from the question of breach of contract. Even then, the court of appeals narrowly focused on the events of November 1987, and almost exclusively on the question of whether the City had the contractual right to alter the Project's fundamental design by means of the Cramer Resolution. In direct conflict with the holdings of two respected district court judges and the verdict of the jury, the court of appeals held that the Contract *unambiguously* granted the City the right to adopt the Cramer Resolution. It did so despite the obvious inconsistency between the contractual language specifying that the final plans could be rejected *only* if they were *not* in "conformance with" the preliminary plans (which incorporated the dome-and-tunnel concept) and the City's claimed right to reject final plans

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proved and a concept drawing was part of the approved documents. The [City] knew that the dome and tunnel plan . . . was an integral part of the presentation being made to prospective anchor tenants. This design plan was appended to the development contract. The Court found, and maintains that it is not clear from the plain language what the parties intended in their use of the term 'final design [approval of the Project's] treatment.'" RB.4 at 4.

[6] Judge Rosenbaum also held that the jury's out-of-pocket expenses award was subsumed by the award of lost profits.

incorporating precisely that design concept.[7] The court of appeals also held that the City had not breached the Contract by sending harmful letters to potential anchor tenants or by attempting to terminate the Contract during a period of "Unavoidable Delay."

Based on this limited analysis, the court of appeals overturned the jury's verdict in its entirety. The court rationalized the City's actions during November 1987 with respect to Project 1 and then found that those actions did not constitute breaches of the Contract. The court, however, totally ignored the substantial evidence petitioners presented to the jury of the City's numerous *other* bad faith breaches in the months following November 1987 with respect to Projects 2 and 3, evidence which separately supported the jury's general verdict of breach. In so doing, and in reversing rather than affirming or, at a minimum, remanding for a new trial, the court of appeals manifestly disregarded the norms of federal civil procedure in jury trials.

REASONS FOR GRANTING THE PETITION

The court of appeals' outrageous holding that the Contract was unambiguous—despite two independent rulings by district court judges to the contrary—was flatly wrong and unjustly deprived petitioners of any remedy for harm done by respondents. Far more importantly for this Court's purposes, however, the decision of the Eighth Circuit raises a significant and recurring question

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[7] The court of appeals focused on the "District Court's mistake" in its post-trial opinion in construing the words of the Contract. However, the grammatical error in Judge Rosenbaum's post-trial opinion and his citation to the wrong trial exhibit *were caused by the City*. The City, in its Brief in Support of its Motion for Judgment Notwithstanding the Verdict, misquoted the language of Section 2.02 and provided the district court with the inaccurate citation. The court of appeals, apparently recognizing the irrelevancy of the misquotation, summarily concluded that the word "treatment" "must" include the "approval of the dome and tunnel concept." App. at 13a.

with respect to federal civil procedure and the proper respect for the role of the jury in federal civil trials, *viz.*, whether it is proper for a court of appeals to *reverse* a general verdict upon holding that *some* factual basis upon which the jury could have relied was deficient. The fact that the court of appeals' opinion itself does not highlight this issue—*i.e.*, it does not address the evidence of subsequent breaches presented to the jury by petitioners, or explain why it is unnecessary to do so—is hardly surprising. The court mistakenly assumed, at the invitation of respondents (Appellants' Reply Br. at 4), that it could overturn the jury's general verdict if only one of the grounds for breach was factually insufficient. This error in the evaluation of general verdicts will appear most often in precisely this manner—as an implicit, but no less controlling, holding.

The decision of the court of appeals not to consider the independent grounds supporting the jury's general verdict of breach conflicts with decisions in the Fifth and Seventh Circuits that have expressly applied this Court's decision in *Griffin* v. *United States*, 502 U.S. 46 (1991), to civil actions. *Griffin* held that general verdicts in criminal cases were to be *affirmed* even if one possible ground for the verdict was unsupported by sufficient evidence. *Id.* Moreover, the decision of the court of appeals conflicts with the decisions of the Fifth, Seventh, and Tenth Circuits requiring, at a minimum, a remand for a new trial whenever an issue is erroneously submitted to a jury that returns a general verdict. Thus, this case presents the Court with a perfect vehicle for resolving fundamental conflicts among the circuits with respect to the proper method of appellate review of general verdicts.

1. In *Griffin* v. *United States*, 502 U.S. 46 (1991), the United States charged the defendant with one count of conspiracy. The jury returned a general verdict against the defendant. The defendant attacked the general verdict because one of the two alleged objects of the conspiracy had not been supported by sufficient evidence. Nonetheless, this Court upheld the conviction:

> It was settled law in England before the Declaration of Independence, and in this country long afterwards, that a general jury verdict was valid so long as it was legally supportable on one of the submitted grounds—even though that gave no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury's action.

Id. at 49. So long as one of the bases for a general verdict has sufficient evidentiary support and the jury has not been given a legally erroneous instruction, the general verdict must be affirmed.[8]

Both the Fifth and Seventh Circuits have applied *Griffin* to civil cases. In *Walther* v. *Lone Star Gas Co.*, 952 F.2d 119 (5th Cir.), *reh'g denied by* 977 F.2d 161 (5th Cir. 1992), the court upheld a jury verdict of age discrimination even though one of the grounds submitted by the plaintiff was not factually supported. The Fifth Circuit, noting this Court's decision in *Griffin*, concluded that it would not reverse the general verdict "simply because the jury might have decided on a ground that was supported by insufficient evidence. Instead we must assume that the jury considered all of the evidence in reaching its decision." *Id.* at 126.

Likewise in *Composite Marine Propellers* v. *Van Der Woude*, 962 F.2d 1263 (7th Cir. 1992) (per curiam), the Seventh Circuit, relying on *Griffin*, refused to overturn the jury's general verdict on misappropriation of trade secrets unless none of the eight possible trade

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[8] *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962), is not to the contrary. *Sunkist* involved a general verdict reached by a jury that had received a legally erroneous instruction that a subsidiary could conspire with its corporate parent. *Id.* All of this Court's decisions applying *Sunkist* have involved juries given legally erroneous instructions. *See Spectrum Sports, Inc.* v. *McQuillan*, 113 S. Ct. 884, 892 (1993); *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 384 (1991). The present case does not turn on a legally erroneous instruction.

secrets had been misappropriated. *Id.* at 1265. "The jury returned a general verdict, so if the evidence supports any of them, the verdict must be sustained." *Id.*[9]

In the present case, however, the Eighth Circuit ignored *Griffin*[10] and overturned the jury's general verdict even though it failed to consider the substantial evidence demonstrating that the City had breached the Contract repeatedly *after* November 1987. At the close of oral argument it became apparent that the court of appeals, with the City's endorsement during rebuttal, was contemplating reversing the general verdict solely on the basis of a finding that the City's November 1987 actions did not breach the Contract. Petitioners immediately attempted to file a Post-Argument Memorandum reminding the court that the general verdict could not be reversed on that basis alone because of the numerous subsequent breaches committed by the City.[11] The Eighth Circuit, however, refused the memorandum and proceeded to overturn the jury's general verdict without considering all of the factual grounds for breach.

The Eighth Circuit erred in not following *Griffin* because *Griffin* applies at least with equal force to general verdicts reached in civil cases. It is uniquely the province of the jury, whether in criminal or civil trials, to weigh the evidence and to determine what facts have been proved. This Court in *Griffin* found no reason not to

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[9] *See also FDIC* v. *Holbrook & Johnston*, 632 N.E.2d 424, 427-28 & n.12 (Mass. Ct. App.), *review denied*, 638 N.E.2d 913 (Mass. 1994) (state case upholding civil general verdict as long as any one of four factual characterizations was supported by sufficient evidence, noting that the circumstances in *Griffin* were "far less attractive analytically").

[10] The Sixth Circuit likewise has reused to apply *Griffin*'s holding to general verdicts in civil cases, claiming that *Griffin* "does not alter the longstanding civil general verdict rule . . . to which this circuit has consistently adhered." *Virtual Maintenance Inc.* v. *Prime Computer, Inc.*, 11 F.3d 660, 667 (6th Cir. 1993).

[11] *See* App. at 49a-52a.

rely on the jury's factfinding ability when it was presented with inadequate factual bases for a verdict:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law . . . . When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence.

502 U.S. at 59. Jurors are no *less* capable of analyzing the evidence presented to them in civil cases. In civil cases the intelligence and expertise of the jury should also assure the court that the jury has not relied on factually inadequate grounds to reach its general verdict. Unless a *constitutionally or legally* inadequate instruction is submitted to the jury, a civil general verdict supported by at least one factual ground should be upheld.

This result, unlike the decision reached by the Eighth Circuit, produces no hardship on the party facing a general verdict. If the party wishes to know with certainty the precise grounds on which a jury's verdict is based, Federal Rule of Civil Procedure 49 permits the party to seek special verdicts or interrogatories. Here, the City did not do so and accepted the verdict form. A party should not be permitted to void the jury's considerable factfinding efforts simply by showing that some of the numerous grounds presented to it were factually inadequate to support the general verdict. The split of authority among the circuits with respect to *Griffin* and the treatment of general verdicts in federal civil cases threatens the finality and repose of jury verdicts supported by sufficient evidence and therefore the decision of the court below merits this Court's review.

2. The Eighth Circuit's decision to reverse outright the general verdict also conflicts with the decisions of sev-

eral courts of appeals holding that general verdicts possibly based on improper grounds, whether legal or factual, at a minimum should be remanded for retrial. In *Dillard & Sons Construction, Inc.* v. *Burnup & Sims Comtec, Inc.*, Nos. 93-7090, 93-7101, 1995 WL 145981 (10th Cir. Apr. 4, 1995), the Tenth Circuit held that the district court had erroneously submitted a question of law to the jury and had *remanded* the case for a new trial. *Id.* at *5. The court of appeals followed the circuit's general rule that "a general verdict cannot stand" when an issue is submitted to the jury in error. *Id.* The court could not determine for itself what effect the erroneous submission had on the jury's deliberations and whether, absent that submission, the jury would have returned the same general verdict. *Id.* Therefore, the court concluded a new trial was necessary. Likewise, in *Reeves* v. *Acromed Corp.*, 44 F.3d 300 (5th Cir. 1995), the Fifth Circuit held that one of the four theories of recovery submitted to the jury by the district court was preempted by federal law. *Id.* at 307. The court remanded the case for *retrial* because there was sufficient evidence under one of the other theories of recovery to support the submission of the issue to the jury. *Id.* at 308.[12] Under *Griffin*, of course, the unnecessary exercise, and expense, of a new trial—where the jury's verdict is supported by the evidence—would be avoided by *affirming* the general verdict.

In the instant case, the Eighth Circuit, in direct conflict with the decisions of three other courts of appeals, made no determination about the other evidence supporting the jury's general verdict of breach. The court instead simply overturned the jury's verdict and dismissed the case. Thus, even if the jury could not have found the

[12] Likewise, in *Astor Chauffeured Limousine Co.* v. *Runnfeldt Investment Corp.*, 910 F.2d 1540 (7th Cir. 1990), the Seventh Circuit overturned a general verdict and held that a new trial was necessary because the district court had submitted a factual theory of liability to the jury that was inconsistent with its position in a previous suit. *Id.* at 1548-49.

City liable for breach on the basis of the Cramer Resolution or any of respondents' other acts in November 1987, the court of appeals thwarted the jury's factfinding role by ignoring the evidence presented to it of the City's actions over the following 18 months. Even if *Griffin* does not apply to civil cases, the Eighth Circuit's refusal at least to remand the case for a new trial is contrary to the decisions of the other courts of appeals to reach this issue.

Allowing the Eighth Circuit's decision to stand will place plaintiffs in federal jury trials under an inordinate and unreasonable burden to limit their presentation of facts before the jury for fear of providing defendants with *one* insufficient ground that will allow the jury's verdict to be overturned. This perverse rule will also encourage defendants to appeal every general verdict. If the defendant can demonstrate that any one of the several grounds presented to the jury by the plaintiff was factually insufficient, the entire verdict will fall and the plaintiff will not be allowed to retry the case, even though all other grounds presented to the jury may have been supported by sufficient evidence, and indeed, relied upon by the jury in reaching its general verdict.

Accordingly, the decision of the court below raises two separate conflicts in decisions among the courts of appeals with respect to the proper treatment of general verdicts in federal civil trials. The Eighth Circuit's decision not to affirm the jury's general verdict is in conflict with this Court's decision in *Griffin* and those courts of appeals that have adopted *Griffin* in the civil context. The Eighth Circuit's decision not to remand the case for retrial also is in conflict with the decisions of those courts of appeals that have reached the issue. Moreover, further confusion in the federal court system exists because these two lines of cases seemingly conflict with each other, at least in instances when theories that are not in conflict with the law, but are nonetheless insufficiently supported by the facts, are submitted to a jury that

reaches a general verdict. Under *Griffin* the reviewing court should affirm the general verdict. Under the other line of cases, however, the court is to remand the case for a new trial. In no event, however, is a court justified in merely overturning a general verdict as the Eighth Circuit has done in this case. The decision of the court below presents the Court with an opportunity to settle definitively this issue of pivotal importance for all federal civil jury cases ultimately decided on the basis of a general verdict.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 18, 1995

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3123/2920

LASOCIETE GENERALE IMMOBILIERE,
a French corporation; LSGI, INC.,
a Delaware corporation,
Appellees/Cross-appellants,

v.

MINNEAPOLIS COMMUNITY DEVELOPMENT AGENCY;
CITY OF MINNEAPOLIS,
Appellants/Cross-appellees.

Appeal from the United States District Court
for the District of Minnesota

Submitted: May 11, 1994

Filed: December 22, 1994

Before McMILLIAN, Circuit Judge, LIVELY,* Senior Circuit Judge, and WOLLMAN, Circuit Judge.

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* The Honorable Pierce Lively, Senior United States District Judge for the Sixth Circuit, sitting by designation.

McMILLIAN, Circuit Judge.

The Minneapolis Community Development Agency and the City of Minneapolis appeal from a final judgment entered in the United States District Court for the District of Minnesota upon a jury verdict finding them liable to La Societe Generale Immobiliere and LSGI, Inc., for the breach of a development contract and for injury to the developer's reputation in violation of the Due Process Clause of the Fourteenth Amendment. *La Societe Generale Immobiliere v. Minneapolis Community Dev. Agency*, 827 F. Supp. 1431 (D. Minn. 1993) (Order). For reversal, appellants argue that the district court erred in holding that: (1) the development contract at issue was ambiguous, (2) the City or the Mayor breached the contract, and (3) the claims brought under 42 U.S.C. § 1983 were cognizable as a matter of law. Appellants have also raised a number of issues with regard to damage calculation. La Societe Generale Immobiliere and LSGI, Inc., filed a cross-appeal on the issue of damages. For the reasons discussed below, we reverse the judgment of the district court.

I. BACKGROUND

In mid-1985, the Minneapolis Community Development Agency (MCDA)[1] and the City of Minneapolis (jointly, the "City") granted La Societe Generale Immobiliere (LSGI), a French real estate company, exclusive rights to negotiate the development of a new shopping center on Nicollet Mall in downtown Minneapolis. The project contemplated 900,000 square feet of retail shops and stores, a 400,000 square foot office building, and an underground parking garage. The development rights

[1] The MCDA is an agency whose responsibilities include assisting in economic development of the City of Minneapolis. The MCDA is governed by a thirteen-member Board of Commissioners comprised of the thirteen sitting City Council members. The MCDA also employs a professional staff.

extended over three and one-half blocks with the project's center on the City's north-south axis street, Nicollet Mall.

LSGI's plans envisioned a dome over the Nicollet Mall and the depression of the street into a tunnel (the so-called "dome and tunnel" design). This proposed design was immediately the subject of controversy, and a number of city officials and local business-persons expressed reservations about the concept. As part of this debate, on July 25, 1986, the City Council commissioned a Committee on the Future of the Nicollet Mall (Mall Committee). The overall design of the project was among the issues that the Mall Committee was to consider. John Cairns, an attorney for LSGI, served on the Mall Committee as an LSGI representative. On the same day the City Council created the Mall Committee, it also approved the sale of seventy-three million dollars of tax increment bonds for the project "subject to final design approval of the project's treatment of the Nicollet Mall by the City Council." Minneapolis Mayor Donald M. Fraser did not approve of this City Council action because, among other things, he had concerns about the project's design. However, the City Council's action became effective on July 31, 1986, because of the Mayor's inaction.

By September 1986, negotiators for MCDA and LSGI had largely completed the drafting of a Development Agreement as well as a lease and related documents. Attached to the Development Agreement were various exhibits, including a set of LSGI's preliminary plans for the dome and tunnel design. Before the Development Agreement could be executed, the MCDA Board and the Mayor were required to approve it. This approval would have authorized the Executive Director of the MCDA to sign the Development Agreement. On September 26, the Board gave its authorization, but on October 2, the Mayor vetoed this resolution and expressed his concern

that LSGI would market the proposed project using the dome and tunnel design concept. The Mayor specifically stated:

> If we sign this contract [the Development Agreement] we will be telling [LSGI] that we are prepared to go ahead with the basic design which [they have] proposed for the south end of the mall. It is true that we have final design approval over the treatment of the mall, but clearly LSGI will be marketing their project based on their current design.

The Mayor requested a six-week delay in the execution of the Development Agreement to enable the Mall Committee to finish its work. He also expressed the view that the Development Agreement should clearly recognize the City's prerogative to take into account the conclusions of the Mall Committee before making a final decision about the dome and tunnel design concept. Public debate over the dome and tunnel design concept continued throughout this period.

Before the Mall Committee's process had run its course, LSGI responded to the Mayor's concern by proposing the addition of language to the Development Agreement that clarified the City Council's continuing control over the project's design. This language was to be added to Section 2.02 of the Development Agreement. Section 2.02 was titled "MCDA Approval" and was included under Article II of the Development Agreement which was titled "Plan Approval." The original version of Section 2.02 stated in relevant part:

> It is understood by the Developer and the MCDA that no action of the Minneapolis City Council shall be necessary to approve the form or content of any of the proposed Project Plans or Specifications except for final design approval of the Project's treatment of the Nicollet Mall by the City Council.

The revision added the following language to the end of the above-quoted sentence:

> and further except that any such proposed Project Plans or Specifications shall be modified by the Developer to comply with any and all design guidelines or any and all other requirements related to the treatment of the Nicollet Mall adopted by the Minneapolis City Council prior to the final approval by the MCDA of the Proposed Project Plans and Specifications . . . .

The Mayor was satisfied with this additional specific recognition of the City's continuing control over the dome and tunnel design concept. He therefore invited the MCDA Board to override his veto and to authorize execution of the Development Agreement. The Development Agreement was executed and became effective on November 3, 1986. In the Development Agreement, LSGI promised to obtain the commitments of two major department stores, or "anchor" tenants. LSGI also promised to secure financing, present detailed final project plans, produce a number of other agreements, and resolve certain issues related to the project. During the year following execution of the Development Agreement, LSGI's design continued to create public controversy. In December 1986, the Mall Committee issued a report which recommended that transportation on the Nicollet Mall should remain at grade. The Mall Committee also recommended that the historical environmental feeling of openness of the Mall should be retained. Meanwhile, LSGI showed preliminary plans for the project, which included the dome and tunnel design concept, to numerous stores throughout the country.

On November 3, 1987, the anniversary of the execution date of the Development Agreement and the date set for closing, LSGI had delivered the commitment of only one anchor tenant, Nordstrom's. LSGI produced only a letter of possible interest from the Neiman-Marcus

chain. LSGI also failed to comply with a number of the other contractual obligations that were to be accomplished by November 3, 1987. LSGI, therefore, sought an extension of the Development Agreement in the form of a Post-Closing Agreement. The Post-Closing Agreement included a Post-Closing Schedule that gave LSGI a thirty-day extension to secure a second anchor tenant. LSGI, however, was unable to secure a second anchor.

Prior to the execution of the Post-Closing Agreement, the MCDA Board adopted a resolution referred to as the "Cramer Resolution," directing City officials working in consultation with the Nicollet Mall Implementation Staff (successor to the Mall Committee), the MCDA, and LSGI, to develop design guidelines for the project within thirty days that did not include a dome or a tunnel. The Cramer Resolution, which effectively rejected the dome and tunnel design concept, was debated and enacted at a public meeting of the MCDA Board of Commissioners on November 3, 1987. Two LSGI lawyers were present at the meeting. LSGI principal Bala Safyurtlu was also present. During the course of the meeting, the MCDA's attorney told the Board that the Development Agreement permitted the Cramer Resolution. No LSGI representative attempted to contradict this representation. Moreover, an LSGI attorney, John Cairns, made the following statement to the Board:

> On this question of design let me just tell you that we have said for months if not twelve months since we were here with you a year ago that we will reach a consensus on that design with you and you get the final shot at it. That's still in the contract, that's always been there . . . .

Neither the other LSGI attorney present nor LSGI principal Safyurtlu challenged this assertion. Five hours after the Cramer Resolution was enacted, LSGI and the City executed the Post-Closing Agreement which postponed many of LSGI's deadlines and contained language regard-

ing the City Council's right to final design approval which corresponded to similar language in the Development Agreement.

After the adoption of the Cramer Resolution, the *Minneapolis Star-Tribune* reported that Bruce Nordstrom, co-chair of Nordstrom's department stores, was surprised by the Cramer Resolution. On November 5, 1987, after reading Mr. Nordstrom's comments, Mayor Fraser wrote Nordstrom a letter explaining the planning and development process and assuring him of the City's continuing interest in Nordstrom's: "We very much want you to place a store in Downtown Minneapolis." On November 16, Mayor Fraser sent a similar letter to Robert Smith of Neiman-Marcus. The Mayor explained the City's position on the dome and tunnel design concept, but at the same time, he emphasized the City's desire to have Neiman-Marcus locate a store on the Nicollet Mall. During this time period, Mayor Fraser addressed a class of architecture students at the University of Minnesota. This lecture was secretly recorded, and its substance was reported in the *Skyway News,* a weekly local paper. As Mayor Fraser discussed the day-to-day difficulties of urban planning, he made reference to the Nicollet Mall project. According to the article, the Mayor specifically mentioned LSGI in the course of his discussion and later generally commented: "One of the things I've learned about developers is that they'll promise you anything . . . . Never believe a thing they say. Only when you get to the bottom line can you believe them."

On November 16, 1987, the "614 Company," which owned property in the area to be acquired by the City under the lease for the project, sued the MCDA in state district court alleging a temporary taking of its property, requested an order to compel the MCDA to resubmit the LSGI Development Agreement to the City Council for review and approval, and sought attorney's fees and other relief. Approximately two months later and seven weeks

after the extended deadline for LSGI to secure a second anchor, the MCDA notified LSGI that it was in default under the Post-Closing Agreement to the Development Agreement and under the Lease between the parties. MCDA stated that LSGI's failure to secure a second anchor was the basis for the default. This notice started a sixty-day period to cure the default that would be followed by a thirty-day period to avoid termination. On January 28, 1988, LSGI advised the City that the suit by the 614 Company constituted an unavoidable delay, as defined in the Development Agreement, until the litigation was resolved, and therefore, LSGI's rights under the Development Agreement could not be terminated.

On March 7, 1988, LSGI presented new basic design plans to the MCDA. On April 1, 1988, the City Council approved LSGI's plans and its design treatment of the Nicollet Mall as required by the Development Agreement. In addition, the City granted LSGI an extension until May 8, 1988, to produce evidence of a second major anchor tenant's commitment to lease space in the project and to provide evidence of project financing. On April 7, 1988, the Mayor vetoed the City Council's action of April 1, but on April 8, the veto was overridden by the City Council. By a letter dated that same day, the MCDA notified LSGI that unless LSGI cured its default by May 9, 1988, the MCDA would terminate LSGI's rights under the Development Agreement. By a letter dated May 11, 1988, the Executive Director of the MCDA informed LSGI that the period in which LSGI could cure its default under the Development Agreement had expired. However, the Director also informed LSGI that the MCDA was willing to forego termination of the Development Agreement if LSGI would agree to attempt the negotiation of an amended Development Agreement. These negotiations took place and lasted until May 1989, but they never resulted in the execution of an amended Development Agreement. On May 12, 1989, the MCDA Board, over LSGI's opposition, voted to terminate the

Development Agreement, and on June 1, 1989, the MCDA did in fact terminate the Development Agreement. This litigation followed shortly thereafter.

LSGI claimed that the City breached the Development Agreement and deprived LSGI of its constitutional rights under the Fourteenth Amendment. After a three-week trial, a jury found that City liable for breach of contract and loss of reputation, and judgment was entered on March 8, 1993 in the amount of $34,319,739. This amount reflected the jury's awards of $3,239,804 for reimbursement of out-of-pocket expenses, $22,500,000 for loss of projected future profits, and $8,579,935 for harm to LSGI's reputation. This amount was later reduced by the district court to $17,280,000 as a result of the City's post-trial motion. The City's motion for judgment as a matter of law and a new trial was denied. The City now appeals from the final judgment, and LSGI cross-appeals from the district court's post-trial denial of out-of-pocket expenses and the remittitur.

II. DISCUSSION

A. *Contract Ambiguity*

At trial, LSGI argued that the MCDA breached the Development Agreement by rejecting the dome and tunnel design concept in the Cramer Resolution. LSGI argued that the MCDA waited until it was too late to reject the dome and tunnel design concept, and therefore, the MCDA Board lacked the authority to eliminate the dome and tunnel design concept. The City argues that the district court erred in failing to grant judgment as a matter of law in favor of the City on LSGI's breach of contract claims. The City contends that under the Development Agreement it unambiguously retained the authority to exercise final design approval over the treatment of Nicollet Mall, specifically, the authority to reject the dome and tunnel design concept. Thus, the City concludes that the Cramer Resolution cannot therefore constitute a breach

of the agreement. In response, LSGI argues that it had provided proposed Project Plans and Specifications more than sixty days before the Closing Date, as required by Section 2.02 of the Development Agreement, and that the MCDA by inaction "approved" those proposed Project Plans and Specifications before the adoption of the Cramer Resolution.[2] LSGI contends this resolution was a breach

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[2] Section 2.02 of the Development Agreement provided in relevant part:

> No later than sixty (60) days prior to the Closing Date, the Developer shall submit two sets of proposed Project Plans and Specifications for the Project to the MCDA for review and approval. . . .
>
> The MCDA shall review the proposed Plans and Specifications so submitted to it by the Developer for general conformance to the Preliminary Plans within fifteen (15) business days of the date on which such materials were submitted by the Developer. If the MCDA reasonably determines the proposed Project Plans and Specifications submitted are in general conformance with the Preliminary Plans and this agreement, the MCDA shall promptly cause one copy of them to be executed by its appropriate official indicating such approval and to be returned to the Developer within such period. Those proposed Plans and Specifications so approved shall become a part of the Project Plans and Specifications. If the MCDA reasonably determines that the materials submitted are not in general conformance with the Preliminary Plans and this Agreement, and thus declines to approve them, it shall provide to the Developer within such fifteen (15) business day period a signed letter indicating with reasonable specificity the areas in which the MCDA believes there is not conformance and shall also indicate such adjustments the MCDA believes are necessary to secure its approval. The Developer may then submit such revisions to the proposed Project Plans and Specifications as it deems necessary to meet the objections of the MCDA so as to bring the proposed Project Plan [sic] and Specifications into conformance with the Preliminary Plans and this Agreement (in which case the MCDA must respond within the time frame and in the manner indicated above). If the MCDA fails to respond within the fifteen (15) business day period, the proposed Project Plans and Specifications so submitted shall be deemed approved and the MCDA

of the Development Agreement because once the proposed Project Plans and Specifications were "approved" under Section 2.02 of the Development Agreement, the MCDA had no power to reject the dome and tunnel design concept. The district court concluded that Section 2.02 was ambiguous and therefore allowed the jury to interpret the Development Agreement.

We review the district court's determination of Minnesota law de novo. *Medtronic v. ConvaCare,* 17 F.3d 252, 255 (8th Cir. 1994). Under Minnesota law, the construction and effect of a contract presents a question of law, unless an ambiguity exists. *Trondson v. Janikula,* 458 N.W.2d 679, 681 (Minn. 1990). The initial question of whether a contract is ambiguous is a question of law to be decided by the trial court. *Lamb Plumbing & Heating Co. v. Kraus-Anderson,* 296 N.W.2d 859, 862 (Minn. 1980). "Ambiguity exists when the language of a written document, by itself, is reasonably susceptible to more than one meaning." *Trondson,* 458 N.W.2d at 681. However, when the intention of the parties to a contract is ascertainable from the writing, construction is for the court. *Chergosky v. Crosstown Bell,* 463 N.W.2d 522, 525 (Minn. 1990). When the court construes a contract, it must construe the contract as a whole and attempt to harmonize all clauses of the contract. *Id.*

In our review of the district court's denial of the City's motion for judgment as a matter of law, we must first determine whether the district court was correct in concluding that the Development Agreement was ambiguous. The district court reiterated its conclusion as to ambiguity when ruling on the City's post-trial motion:

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shall, upon request, execute a certificate of approval. Once proposed Project Plans and Specifications are approved as set forth above, and any other conditions required by this Agreement are fulfilled, the Developer may commence the construction to which the items relate.

> The court found, and maintains, that it is not clear from the plain language what the parties intended in their use of the term "final design treatment." It is, perhaps, conceivable that this provision granted the defendants unfettered discretion to reject LSGI's design at any time, as the defendants contend. The Court finds, however, that it is at least as likely that the provision simply provided for final touch-up and refinement of minor issues. Because of this patent ambiguity, the interpretation of this provision was submitted to the jury.

827 F. Supp. at 1435. We note that the district court mistakenly seized upon the term "final design treatment" in order to demonstrate what it deemed to be a patent ambiguity. However, the term "final design treatment" does not appear anywhere in Section 2.02 of the Development Agreement. The district court order misquoted Section 2.02 of the Development Agreement:

> It is understood by the Developer and the MCDA that no action of the Minneapolis City Council shall be necessary to approve the form or content of any of the proposed Project Plans or Specifications except for *final design treatment* of the Nicollet Mall by the City Council . . . .

827 F. Supp. at 1434 (emphasis added). The first exception of Section 2.02 should read: "except for final design *approval of the Project's* treatment of the Nicollet Mall by the City Council."[3] Appellants' Appendix at 216 (emphasis added).

This misquotation is important because the district court erroneously relied on the phrase "final design treatment" in finding that the Development Agreement was

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[3] This correct version appears on page #11 of Trial Exhibit 2. The district court order refers to Trial Exhibit 3. We assume that this was merely a typographical error because Trial Exhibit 3 was the Post-Closing Agreement, which did not have eleven pages.

ambiguous. While the district court's fear of equivocation in any attempt to interpret "final design treatment" may have been justified, the phrase "final design *approval* of the Project's treatment of the Nicollet Mall" does not warrant such concern. It is clear from the Development Agreement that the City Council retained the right to have the final shot at any proposed design. The Development Agreement further clearly provided that the City Council had to act affirmatively to give its "final design approval." The evidence was undisputed at trial that the City Council had not yet taken such action. Therefore, at the time the MCDA Board of Commissioners, the thirteen sitting council members, passed the Cramer Resolution calling for the design to retain the Mall's historic feeling of openness and to leave the street traffic at grade, the City Council unmistakably held the power to approve or disapprove of the Project's design treatment of the Nicollet Mall.

The district court's concern over the word "treatment" was also misplaced. "Because a word has more than one meaning does not mean it is ambiguous. The sense of a word depends on how it is being used; only if more than one meaning applies within that context does ambiguity arise." *Board of Regents v. Royal Ins. Co. of America*, 517 N.W.2d 888, 891 (Minn. 1994). There are no conflicting uses of the word "treatment" in the Development Agreement. Minnesota law commands that we give contract terms their plain and ordinary meaning. *See Litton Microwave Cooking Prod. v. Leviton Mfg. Co.*, 15 F.3d 790, 796 (8th Cir. 1993) (applying Minnesota law). Because the Development Agreement provided no special definition of the term "treatment," we give the term its ordinary meaning, and therefore, we conclude that the phrase "final design approval of the Project's treatment of the Nicollet Mall" must include approval of the dome and tunnel design concept. Had the parties merely intended for the City Council to have the authority to approve only "final touch-up and refinement of minor is-

sues," such intention would have been made explicit in the Development Agreement. Nothing in the Development Agreement indicates that we should read the phrase to be, in any way, a limitation on the scope of the City Council's authority to reject completely a particular design concept. The language of the Development Agreement clearly provided the "unfettered discretion" which the district court considered a mere possibility under its "final design treatment" analysis. We hold, therefore, that the Development Agreement was not ambiguous.

The authority of the City Council to give or to withhold its final design approval hung like the Sword of Damocles over the heads of LSGI. As Justice Thurgood Marshall noted in another context, the value of the Damoclean Sword is "that it hangs—not that it drops." *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting). On November 3, 1987, the City Council's sword, its power to approve or reject the final design concept, was still in place. LSGI may well have been unwise to grant the City Council such authority, but, where, as here, two sophisticated parties negotiated a commercial contract which was executed in the absence of fraud, duress, or any other form of unconscionability, we will not rewrite the contract in order to save a contracting party from its own poor decisions. *See In re Stevenson Assoc.*, 777 F.2d 415, 421 (8th Cir. 1985) (applying Minnesota law); *Telex Corp. v. Data Prod. Corp.*, 135 N.W.2d 681, 687 (Minn. 1965) ("It is not ordinarily the function of courts to rewrite, modify, or set aside contract provisions fully considered and agreed upon between the parties."); *see also Morello v. Federal Barge Lines*, 746 F.2d 1347, 1351 (8th Cir. 1984) ("Courts of law do not sit in order to save parties from their contractual mistakes.").

LSGI argues that under the second exception of Section 2.02 of the Development Agreement, only the City Council and not the MCDA Board had the authority to

adopt the Cramer Resolution. That exception provided for LSGI's compliance with "any and all design guidelines or any and all other requirements related to the treatment of Nicollet Mall adopted by the Minneapolis City Council prior to final approval by the MCDA of the proposed Project Plans and Specifications." LSGI attempts, through a highly technical reading, to create a distinction between the MCDA Board and the City Council to support its theory of breach, i.e. that the MCDA did not have authority on November 3, 1987, to pass the Cramer Resolution.[4] Applying the close reading urged by LSGI, we conclude that the second exception made clear the City Council's ability to exercise control over and inject its views into the project design development process. The language of this second exception cannot be read to limit the authority of the City Council provided in the first exception, to approve or reject the final design concept. Because the City Council clearly retained its plenary power to grant or deny final design approval on November 3, 1987, the action of the council members, sitting as the MCDA Board, cannot, as a matter of law, constitute a breach of the Development Agreement.

B. *The Mayor's Statements*

LSGI also argued that certain statements made by Mayor Fraser in November 1987 constituted a breach of the Development Agreement because they hindered LSGI's ability to secure a second anchor tenant. These

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[4] While addressing a different issue, the district court had occasion to make the following statement with regard to the relationship between the City Council and the MCDA: "Throughout this litigation, the parties have agreed that it was unnecessary to distinguish between the City of Minneapolis and the MCDA. The members of the MCDA board and the members of the Minneapolis City Council are the same individuals. These two public bodies functioned in complete congruity with respect to the LSGI contract." 827 F. Supp. at 1437.

statements consisted of the letter to Robert Smith of Neiman-Marcus, the letter to Bruce Nordstrom of Nordstrom's department stores, and the remarks about the trustworthiness of developers made in an address to a group of architecture students at the University of Minnesota. The City argues that LSGI's claim of breach of the contract predicated on these statements must fail as a matter of law because LSGI introduced no evidence to establish a causal link between any of these statements and the inability of LSGI to secure a second anchor tenant. Further, the City claims that the Mayor's remarks to the architecture class regarded a matter of public concern and were therefore privileged. LSGI responds to this argument of privilege by claiming that any immunity exists to protect public officials from tort actions and not breach of contract actions. LSGI also contends that if the Mayor did have immunity in this case, it would be personal only and would not protect the City from liability.

Minnesota law provides that "contract performance is excused when it is hindered or rendered impossible by the other party." *Zobel & Dahl Constr. v. Crotty*, 356 N.W.2d 42, 45 (Minn. 1984). Further, "a breach of contract occurs under those circumstances." *Id.* Minnesota law also provides that there must be a causal link between the alleged breach and the party's claimed damages. *See Nguyen v. Control Data Corp.*, 401 N.W.2d 101, 105-06 (Minn. Ct. App. 1987). Causation is a question of fact, and the jury's conclusion will not be upset "unless the court finds it to be manifestly contrary to the weight of the evidence." *Lamke v. Louden*, 269 N.W.2d 53, 56 (Minn. 1978).

We hold the record before us does not support the jury's finding of causation. LSGI simply produced no evidence that the Mayor's letters had any adverse effect on its attempt to secure a second anchor tenant. With regard to the letter to Neiman-Marcus, its representative testified that the Mayor's letter had no effect on his com-

pany's decision to back away from its initial statement of interest in the project. However, even if LSGI had produced such evidence, the evidence would have to demonstrate that the letters were in some way inconsistent with any action which the City could properly take under the terms of the Development Agreement. Minnesota law does not provide for a breach of contract action for any and all hindrances of one party's performance by the action of another. Rather, "every contract contains an implied condition that each party will not *unjustifiably* hinder the other from performing." *Zobel & Dahl Constr.*, 356 N.W.2d at 45 (emphasis added). The City's rejection of the dome and tunnel design concept may have made it more difficult for LSGI to fulfill its obligation to secure two anchor tenants, but where the City's action was authorized by the Development Agreement, such action was not an unjustifiable hindrance and thus cannot constitute the basis for a claim of breach of contract. Therefore, the Mayor's letters, which did no more than explain the City's action, cannot, as a matter of law, breach the Development Agreement.

With regard to the Mayor's remarks to the architecture class, we will assume for purposes of analysis only that they were not privileged. Arguing against the application of any sort of privilege, LSGI itself noted that this claim is not a tort claim, but a breach of contract claim. LSGI had to come forward with some evidence to show that the Mayor's remarks did in fact unjustifiably hinder its ability to secure a second anchor tenant. LSGI, however, presented no evidence that the *Skyway News* report of the Mayor's remarks in any way adversely affected LSGI's ability to secure a second anchor tenant. LSGI would have us consider the mere fact that it did not obtain a second anchor tenant to be sufficient proof of causation. Without any evidence that these statements adversely influenced the decision-making process of a prospective anchor tenant or otherwise unjustifiably hindered LSGI's performance, LSGI's claim that the Mayor's remarks

about the trustworthiness of developers effectively breached the Development Agreement is also insufficient as a matter of law.

C. *Unavoidable Delay*

There is some dispute between the parties as to whether a theory of unavoidable delay based on the 614 Company litigation was submitted to the jury as a separate ground upon which it could find the City liable for breach of contract. LSGI contends that it did not affirmatively argue unavoidable delay to the jury as a separate ground for finding a breach, but at the same time, it maintains that termination during a period of unavoidable delay would be improper. Further, it has argued that the 614 Company lawsuit did represent an unavoidable delay under the terms of the Development Agreement. Because the verdict form simply asked whether the City breached the Development Agreement and because the district court instructed the jury that unavoidable delay, not caused by either party, would excuse nonperformance, we will assume for purposes of analysis that a theory of unavoidable delay was presented to the jury as an independent theory of the City's breach of the contract. This approach is consistent with our duty to analyze the evidence in the light most favorable to the prevailing party when reviewing the denial of judgment as a matter of law (JNOV). *White v. Pence*, 961 F.2d 776, 779 (8th Cir. 1992).

Under the Development Agreement, a third party lawsuit constituted an "unavoidable delay" and postponed the timing for the fulfillment of obligations made subject to any unavoidable delay. Therefore, LSGI's argument is that the City's termination of the Development Agreement was wrongful because LSGI's failure to obtain a second anchor tenant could not serve as a proper basis for the City's action in light of the 614 Company lawsuit. The City asserted in its brief that the evidence was uncontradicted that the 614 Company lawsuit was not

caused by the MCDA and that the 614 Company litigation was still pending. Therefore, the third party action was an "Unavoidable Delay" as that term is defined by the Development Agreement. Section 15.03 of the Development Agreement provided that the City's right to terminate the contract was "subject to Unavoidable Delays." The language of this section requires us to consider the provisions of Section 17.08 entitled "Enforced Delay in Performance Beyond Control of Party." This section allowed an extension for performance of any obligation made subject to unavoidable delays "provided, that the party seeking the benefit of the provision of this section shall, within thirty (30) days after the beginning of any such Unavoidable Delay, have first notified the other party thereof, and requested an extension for the period of such delay." In considering the parties' motions for summary judgment, the district court noted that the 614 Company lawsuit was commenced on November 18, 1987, and that LSGI's first written assertion of unavoidable delay did not occur until January 28, 1988. Further, the district court noted that LSGI did not dispute the fact that its notice was tardy. The district court ruled, however, that the notice provision should not be enforced under Minnesota law unless the party who was to receive notice could prove prejudice. *La Societe Generale Immobiliere v. The Minneapolis Community Dev. Agency*, No. 3-89-372, slip op. at 12 (D. Minn. July 19, 1990) (Summary Judgment Order). Finding that prejudice to the MCDA was unlikely here, the district court denied summary judgment on this ground.

To support its understanding of Minnesota law on the enforcement of notice provisions, the district court relied on two cases which involved circumstances unique to the insurance industry. *See St. Paul Fire & Marine Ins. Co. v. Wabash Fire & Casualty Ins. Co.*, 264 F. Supp. 637 (D. Minn. 1967); *Reliance Ins. Co. v. St. Paul Ins. Co.*, 239 N.W.2d 922 (Minn. 1976). The district court improperly relied on these insurance cases in order to disregard the clear language of the commercial development

contract at issue in the present case. In *Reliance*, for example, the Supreme Court of Minnesota was called upon to decide whether an attorney being sued for malpractice lost the benefit of her liability insurance policy by failing to notify her insurer in the timely manner required by the policy. Concluding that the insured's late notification did not bar coverage, the court stated:

> One of the prime reasons for this type of liability insurance is to pay damages caused by certain acts or omissions of the insured. . . . The very nature of these peculiarities insured against indicates that this type of insurance is not only a contract between the insurer and the insured but also a contract for the benefit of the public. Therefore, we hold that despite delay in notification the insurers are required to afford coverage under their contracts in the absence of actual prejudice, should liability be otherwise shown according to the terms of the policies.

239 N.W.2d at 924. The limited nature of this holding does not fairly support the district court's expansive conclusion that notice provisions in all types of contracts will not be enforced in the absence of actual prejudice. But for the district court's summary judgment order in this case, we have found no authority for the broad application of *Reliance* to contracts in general.[5] When interpreting commercial contracts like the one before us, we will give notice provisions their plain and ordinary meaning. Therefore, LSGI could not seek the benefit of the extension for performance provided under Section 17.08 of the Development Agreement because, by its own admission, it did not timely notify the City of its desire

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[5] In *Naylor v. The Minnesota Daily*, 342 N.W.2d 632, 635 (Minn. 1984), the court cited to *Reliance* to support its conclusion that the state could assert failure to receive notice of claim as a defense under the state's Tort Claims Act if it could establish prejudice. It also noted that this result was "consistent with the court's construction of notice provisions in *insurance* contracts." *Id.* (emphasis added).

to take advantage of the unavoidable delay extension. Consequently, it was not improper for the City to base its decision to terminate the Development Agreement on LSGI's inability to secure a second anchor tenant. The City was therefore entitled to judgment as a matter of law on the unavoidable delay theory.

D. *Section 1983 claims*

The City also argues the district court erred in denying its motion for judgment as a matter of law on LSGI's constitutional claims. LSGI claimed that it was deprived of both a property interest and a liberty interest, and further asserted that it was denied both procedural and substantive due process. The district court granted the City's motion for judgment as a matter of law on LSGI's property claim, finding that LSGI's breach of contract claim provided an adequate post-deprivation state law remedy. *See Zar v. South Dakota Bd. of Examiners*, 976 F.2d 459, 465 (8th Cir. 1992). However, the district court found sufficient evidence to submit LSGI's liberty claims to the jury. The district court concluded that the Supreme Court's rejection of Section 1983 claims based on injury to reputation alone was not a bar here because the harm to LSGI's reputation clearly occurred in connection with "the deprivation of an existing contractual right." 827 F. Supp. at 1437. Accordingly, LSGI contends in this appeal that it proved and the jury found that Mayor Fraser, acting on behalf of the City, deprived LSGI of a liberty interest, without due process of law, by substantially injuring its reputation in the context of the City's breach of contract.

Because we have concluded that the City did not deprive LSGI of a contractual right, the reasoning of the district court can no longer support the submission of the LSGI's liberty claims to the jury. Although it is our view that LSGI's due process claims were held together by a tenuous chain of legal reasoning fraught with weak links, we need not address all of the weaknesses because

our conclusion that the City did not breach the contract is sufficient to dispose of the Section 1983 claims as well. LSGI properly concedes that the Supreme Court has made clear that injury to reputation alone cannot support a claim for deprivation of a liberty interest without an accompanying alteration of legal status. *See Paul v. Davis*, 424 U.S. 693, 708-09 (1976). LSGI, however, argues that the Mayor's letters and statements simultaneously breached the contract and harmed its reputation. This argument must fail because we have concluded that the Mayor's actions did not, as a matter of law, breach the Development Agreement. The Mayor's letters and remarks did not effect a change in LSGI's legal status. The lawful termination of the Development Agreement and the Mayor's allegedly disparaging letters and remarks, made eighteen months earlier, cannot be joined together to establish a violation of the Due Process Clause. Because LSGI is now left with an ordinary claim of injury to reputation, its Section 1983 claims fail as a matter of law. *Id*; *Clark v. Solem*, 628 F.2d 1120, 1121 (8th Cir. 1980). Thus, we need not consider whether the Mayor's letters and remarks were defamatory; further, we need not consider any issues surrounding the City's liability for the Mayor's letters and remarks or any issues regarding immunity because, even assuming we resolved these issues in favor of LSGI, its Section 1983 claims would still fail as a matter of law.

III. CONCLUSION

We hold the City was entitled to judgment as a matter of law on LSGI's breach of contract and civil rights claims. In light of our decision on liability, we need not address the issues raised on appeal and cross-appeal regarding damages. For the reasons discussed above, the judgment of the district court is reversed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 93-3123/2920MNMI

LASOCIETE GENERAL IMMOBILIERE, *etc.*,
Appellees,

vs.

MINNEAPOLIS COMMUNITY DEVELOPMENT AGENCY, *et al.*,
Appellants.

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

The suggestion for rehearing en banc is denied. Judge Bowman and Judge Magill would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

Judge Loken and Judge Murphy took no part in the consideration or decision of this case.

February 17, 1995

Order Entered at the Discretion of the Court:

/s/ Michael E. Gans
Clerk
U.S. Court of Appeals
Eighth Circuit

APPENDIX C

[Filed July 21, 1993]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

4-92-CV-53

LA SOCIETE GENERALE IMMOBILIERE, *et al.*

v.

THE MINNEAPOLIS COMMUNITY
DEVELOPMENT AGENCY, *et al.*

ORDER

A jury trial in this cause began on February 1, 1993. On February 22, 1993, the jury returned its verdict in favor of plaintiff, La Societe Generale Immobiliere (LSGI), and against the named defendants, the Minneapolis Community Development Agency (MCDA) and the City of Minneapolis. The jury awarded $8,579,935 for harm to LSGI's reputation, $22,500,000 in lost profits damages, and $3,239,804 in out-of-pocket expenses. The jury returned a verdict in favor of the defendants on the plaintiff's tortious interference claims. Consistent with the jury's verdict, judgment was entered by the Court on March 8, 1993.

Both plaintiff and defendants have timely briefed and argued post-trial motions. The defendants move for judgment as a matter of law, pursuant to Rule 50(b), Federal Rules of Civil Procedure (Fed.R.Civ.P.), or for a new trial, pursuant to Rule 59(a), Fed.R.Civ.P. In the

alternative, the defendants seek remittitur. The defendants also move for cancellation of the Notice of Lis Pendens which the plaintiff filed on the property which underlies the "footprint" of the proposed development.

The plaintiff seeks an award of attorneys' fees under 42 U.S.C. §§ 1983 and 1988. In this regard, the plaintiff, on March 23, 1993, filed a Notice of Intent to Claim an Award of Attorneys' Fees, pursuant to the local rules. D.Minn.L.R. 54.3(b)(2).

Defendants' Post-trial Motions

In their brief, the defendants raise eleven arguments in support of their motion for judgment as a matter of law.[1] Alternatively, the defendants raise 25 alleged errors of law which they claim require a new trial. Nine of these claimed errors relate to the jury instructions. To the extent that the defendants properly objected to the instructions, these issues are preserved for appeal. Seven asserted errors relate to the Court's evidentiary rulings, and the conduct of the Court and plaintiff's counsel during this ten-day trial. The Court maintains its previous rulings on these issues.

The defendants' contention that the special verdict form was ambiguous is addressed, *infra*, at footnote 3. The final eight alleged errors relate to the issues of lost profits, out-of-pocket expenses, and the award of damages under § 1983 for harm to LSGI's reputation. These issues are

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[1] Seven of these arguments relate to the insufficiency of the evidence to support the jury's finding of liability. The defendants also contend that LSGI lacked standing to bring its breach of contract claim under Minnesota Statutes, §§ 303.13, 303.20, and 290.371. The defendants also "reassert" all other issues raised in their previous motions for summary judgment and directed verdict. The Court addressed these issues on the record at trial, and maintains its previous rulings. The defendants' assertion that the plaintiff's § 1983 claim was insufficient as a matter of law and was barred under the doctrine of qualified immunity is addressed, *infra*.

addressed, *infra*. The Court turns to the defendants' primary contentions.

First, the defendants claim that the Court erred in ruling that the development agreement was ambiguous. Second, the defendants assert that the Court erred in submitting LSGI's lost profits claim to the jury since—in defendants' view—lost profits were "utterly speculative." Third, defendants contend that the Court erred in submitting LSGI's § 1983 due process claims to the jury. Fourth, the defendants contend that this Court erroneously entered judgment against the City of Minneapolis because the jury's verdict was entered only against the MCDA. Finally, the defendants contend that the plaintiff is not entitled to an award of out-of-pocket expenses in addition to the lost profits damages.

a. *Contract Ambiguity*

The defendants contend that this Court erred in ruling that the development agreement was ambiguous. Defendants contend that the Minneapolis City Council retained unfettered discretion to approve the final design treatment of the Nicollet Mall, which included the right to reject the "dome and tunnel" concept at any time. The contested language provides, in pertinent part:

> It is understood by the Developer and the MCDA that no action of the Minneapolis City Council shall be necessary to approve the form or content of any of the proposed Project Plans or Specifications except for final design treatment of the Nicollet Mall by the City Council and further except that any such proposed Project Plans or Specifications shall be modified by Developer to comply with any and all design guidelines or any and all other requirements related to the treatment of Nicollet Mall adopted by the Minneapolis City Council prior to the final approval by the MCDA of the Proposed Project Plans and Specifications . . . .

(Tr. Ex. 3 at p.11). The defendants conclude that this provision entitled them to reject or redesign the "dome and tunnel" concept at any time until final approval by the MCDA. In their view, they are entitled to judgment as a matter of law on the plaintiff's breach of contract claim.

The construction and effect of a contract provision is a question of law for the court unless an ambiguity exists. *Hydra-Mac v. Onan Corp.*, 450 N.W.2d 913, 916-17 (Minn. 1990). An "[a]mbiguity exists when the language of a written document, by itself, is reasonably susceptible to more than one meaning." *Trondson v. Janikula*, 458 N.W.2d 679, 681 (Minn. 1990).

The Court maintains its previous ruling that the language cited above is ambiguous. It is not at all clear to the Court that, on the 365th day of a one-year contract, the defendants could simply reject an approved design plan. Certainly a clause of this type could reserve finish or treatment details. But the overall design plan had been approved and a concept drawing was part of the approved documents. The defendants knew that the dome and tunnel plan, with the road surface of Tenth Street and the Nicollet Mall within its footprint, was an integral part of the presentation being made to prospective anchor tenants. This design plan was appended to the development contract.

The Court found, and maintains, that it is not clear from the plain language what the parties intended in their use of the term "final design treatment." It is, perhaps, conceivable that this provision granted the defendants unfettered discretion to reject LSGI's design at any time, as the defendants contend. The Court finds, however, that it is at least as likely that the provision simply provided for final touch-up and refinement of minor issues. Because of this patent ambiguity, the interpretation of this provision was submitted to the jury.

b. *Lost Profits Damages*

The defendants contend that, because LSGI's lost profits claim is based upon a business venture which never came into existence, any award of $22,500,000 is inherently speculative. The defendants argue that the lost profits analysis provided by LSGI's expert, Harold W. Perry, was based upon conjectural estimates and assumptions. The plaintiff responds that the lost profits were demonstrated with reasonable certainty through Perry's detailed feasibility analysis.

Minnesota law provides that lost profits are recoverable so long as they are not speculative, remote, or conjectural. *Cardinal Consulting Co. v. Circo Resorts, Inc.*, 297 N.W.2d 260, 267 (Minn. 1980); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1510 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1048 (1993); *Cashman v. Allied Products Corp.*, 761 F.2d 1250, 1253 (8th Cir. 1985). "Lost profits may be recovered if they are a natural and proximate result of the breach, and are proved with reasonable, although not absolute, certainty." *Olson v. Rugloski*, 277 N.W.2d 385, 388 (Minn. 1979). "Uncertainty as to the *fact* of whether any damages were sustained at all is fatal to recovery, but uncertainty as to the *amount* is not." *Cardinal Consulting*, 297 N.W.2d at 267 (*citing El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 261 N.W.2d 358, 363-64 (Neb. 1978) (emphasis in *El Fredo*)). Furthermore, there is "no *per se* rule that only an 'established business' can recover damages for loss of prospective profits." *Leoni v. Bemis Co.*, 255 N.W.2d 824, 826 (Minn. 1977). The method of proving such damages "*depends upon the circumstances of the particular case.*" *Cardinal Consulting*, 297 N.W.2d at 267 (emphasis in original).

The defendants previously challenged LSGI's lost profits claim in a motion to dismiss filed March 11, 1991. The motion was heard by the Honorable Edward J. Devitt, United States District Judge, District of Minnesota. Judge

Devitt reviewed Minnesota law on the issue of lost profits, and scrutinized the expert testimony presented by both the plaintiff and the defendants. After his review, Judge Devitt ruled against the defendants, concluding that "the evidence suggests that a jury could determine to a reasonable certainty both the fact and amount of lost profits damages." (Memorandum Order, April 4, 1991, Docket #77 at p.11.)

At trial, LSGI provided competent and credible expert testimony in the form of a detailed feasibility analysis to support its lost profits claim. The estimates included both a site and market analysis. On the basis of Perry's testimony, the plaintiff sought $45.6 million in lost profits damages. The defendants cross-examined Perry, and offered five damages experts in rebuttal. The Court found, and maintains its ruling, that there was sufficient evidence upon which a jury could fairly determine both the existence and extent of LSGI's lost profits. The jury was properly instructed that it could award lost profits "based only upon a reasonable certainty and not on speculation or conjecture." (Instr. No. 47.)

The jury determined that the plaintiff proved, with reasonable certainty, lost profits in the amount of $22.5 million. The size of this figure—less than 50% of plaintiff's expert's appraisal—was supported by the evidence. The Court finds no grounds to disturb the jury's finding.

c. *LSGI's § 1983 Claims*

The defendants contend that this case, at its core, is a breach of contract case, and that the Court erred as a matter of law in submitting LSGI's § 1983 constitutional claims to the jury. The defendants contend that LSGI failed to show that the MCDA deprived the developer of a constitutionally protected property or liberty interest without due process.[2] The defendants further contend

[2] The defendants raise the argument that they are entitled to qualified immunity from liability. Qualified immunity "is a ques-

that LSGI had an adequate state law remedy, and that the record was devoid of evidence to support the $8,579,935 award for damage to LSGI's reputation.[3]

LSGI claimed that it was deprived of both a property and liberty interest, and further asserted that it was denied both procedural and substantive due process. This Court granted defendants' motion for judgment as a matter of law on LSGI's property claim, finding that LSGI's breach of contract claim provided an adequate post-deprivation state law remedy. *See Parratt v. Taylor*, 451 U.S. 527 (1981); *Zar v. South Dakota Bd. of Examiners of Psychologists*, 976 F.2d 459, 465 (8th Cir. 1992); *Williams-El v. Johnson*, 872 F.2d 224, 228 (8th Cir. 1989), *cert. denied*, 493 U.S. 871 (1989); *Reese v. Kennedy*, 865 F.2d 186, 187 (8th Cir. 1989).[4]

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tion of law that 'ordinarily should be decided by the court long before trial.'" *Swenson v. Trickery*, No. 92-2451, slip op. at 3, 1993 WL 188270 at *1 (8th Cir. June 7, 1993) (*quoting Hunter v. Bryant*, 112 S.Ct. 534, 537 (1991). *See also Arnott v. Mataya*, No. 92-2566, slip op. at 5, 1993 WL 177675 at *2 (8th Cir. May 28, 1993) ("immunity should be determined at the earliest possible stage in litigation"). The defendants neither pleaded nor argued qualified immunity prior to trial. However, in light of *Krueger v. Fuhr*, 991 F.2d at 438 n.2, the Court notes that qualified immunity has not been extended to municipalities. *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980); *Murray v. City of Sioux Falls*, 867 F.2d 472, 474 n.2 (8th Cir. 1989).

[3] The defendants argue that question 9 of the verdict is ambiguous because it is unclear whether the award was based upon LSGI's property or liberty claim. This argument is hollow because the parties stipulated to the verdict form. The Court held numerous charge conferences to address the verdict form, during which the Court itself raised the very issue of which the defendants now complain. Because the defendants failed to object to the verdict form at the charge conferences or at the time of the verdict, this issue has been waived. *Arnott v. American Oil Co.*, 609 F.2d 873, 889 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980); Fed.R.Civ.P. 51. This is invited error, if error it is.

[4] Despite this Court's ruling, the Court submitted the property claim to the jury to avoid a possible retrial on this issue.

The defendants contend that the Court should have similarly dismissed LSGI's procedural and substantive due process liberty claims. The Court maintains its previous determination that *Parratt* does not bar LSGI's liberty claims. *Parratt* does not apply to questions of substantive due process. *Williams-El*, 872 F.2d at 229. As to the procedural due process liberty claim, state tort law does not provide the plaintiff with a constitutionally adequate post-deprivation remedy in light of the defendants' potential immunity defenses. *See Johnson v. Dirkswager*, 315 N.W.2d 215 (Minn. 1982).

The Court found sufficient evidence to submit LSGI's liberty claims to the jury. "To establish a liberty interest under the Fourteenth Amendment for injury to reputation a party must show not only that he was stigmatized but also that he was stigmatized in connection with a denial of a right or status previously held under state law." *Mangan v. Cullen*, 870 F.2d 1396, 1399 (8th Cir. 1989) (*citing Paul v. Davis*, 424 U.S. 693 (1976)).[5]

This Court found that the Mayor's public statements and letters in the days following November 4, 1987, constituted sufficiently egregious governmental conduct to present the substantive due process claim to the jury. Through the testimony of its president, LSGI presented compelling evidence that the Mayor's statements and letters stigmatized LSGI's reputation in the extremely small

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[5] The standard which the plaintiff must meet to prove a violation of its liberty interests varies with the factual context of the case. As examples, the standard applicable to employment cases is delineated in *Shands v. City of Kennett*, Nos. 92-1978 and 92-1790, slip op. at 16-17, 1993 WL 168236 at *9 (8th Cir. May 21, 1993). *See also Codd v. Vegler*, 429 U.S. 624, 626-628 (1977). The standard in cases involving the denial of a building permit is discussed in *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986); *Lemke v. Cass County, Neb.*, 846 F.2d 469 (8th Cir. 1987) (en banc); *Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir. 1990); and *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992).

community of international real estate developers and major "anchor" retailers upon which LSGI's success depended. This harm to LSGI's reputation clearly occurred "in connection with" the deprivation of an existing contractual right. *Mangan*, 870 F.2d at 1399. The Court found LSGI's liberty claims legally sufficient, and the jury found, as a matter of fact, that the defendants' conduct amounted to a constitutional deprivation of due process. The Court declines to disturb the jury's finding.

d. *Judgment Against the City of Minneapolis*

The defendants contend that this Court erroneously entered judgment against the City of Minneapolis because the verdict form only named the Minneapolis Community Development Agency (MCDA). This argument is a sophistry which ill-befits the city. Throughout this litigation, the parties have agreed that it was unnecessary to distinguish between the City of Minneapolis and the MCDA. The members of the MCDA board and the members of the Minneapolis City Council are the same individuals. These two public bodies functioned in complete congruity with respect to the LSGI contract. The defendants factually and tactically tried this case as if they comprised one entity. Any argument to the contrary has been waived.

e. *Out-of-Pocket Expenses Damages*

The defendants contend that the plaintiff is not entitled to an award of out-of-pocket expenses beyond the award of lost profits. The plaintiff argues that because it did not receive the full $45.6 million in lost profits which it sought, it is not precluded from recovering out-of-pocket expenses. The Court rejects the plaintiff's argument.

The jury was properly instructed that, under Minnesota law, out-of-pocket expenses are considered in the calculation of lost profits damages and are not awarded in addition to a lost profits recovery. *See Cardinal Con-*

sulting, 297 N.W.2d at 269; *Inland Products Corp. v. Donovan, Inc.*, 82 N.W.2d 691, 696 (Minn. 1957).

The plaintiff's own calculations acknowledge that expenses are not recoverable in light of the lost profits award. The $45.6 million demand represented the net present value of the development project. To arrive at this figure, Perry calculated the expected profit of the project by subtracting the expected costs from the expected profits (or losses) over a ten-year period.

This argument is also rejected for much the same reason as the Court rejects any dichotomy between the City of Minneapolis and the MCDA. The plaintiff consistently maintained to this Court that, if it received a recovery for lost profits, it would have no claim for out-of-pocket expenses. The verdict form and the jury instructions were shaped by this position. The plaintiff will not be heard to assert—after the verdict—that, if it did not get one hundred cents on each dollar of its claim, it could recover out-of-pocket expenses. The jury's award of out-of-pocket expenses is vacated, and the judgment shall be reduced by $3,239,804.

Lis Pendens

The defendants move for cancellation of the lis pendens filed on the subject property, pursuant to Minnesota Statutes, § 557.02, and *Melin v. Mott*, 4 N.W.2d 600 (Minn. 1942). Section 557.02 provides, in pertinent part, that:

> In all actions in which the title to, or any interest in or lien upon, real property is involved or affected, . . . any party thereto, at the time of filing the complaint, or at any time thereafter during the pendency may file for record with the county recorder . . . a notice of the pendency of the action . . . .

Minn. Stat. § 557.02 (1988). The Court is mindful of the general rule that an appeal continues the lis pendens

until final judgment is entered on appeal. *See Aldrich v. Chase*, 73 N.W. 161, 162 (1897). It is clear that the plaintiff has abandoned its claim for specific performance. The lis pendens is, therefore, no longer necessary to preserve the plaintiff's remedies, it simply hangs like a Damoclean sword over the heads of innocent third parties. This is neither the function of a lis pendens nor the purpose of section 557.02.

Defendants' motion to cancel the lis pendens on the subject property is granted.

Attorneys' Fees

Plaintiff's motion for attorneys' fees is hereby referred to the Honorable Franklin L. Noel, United States Magistrate Judge, for report and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B) and (3), and Local Rule 72.1(f). The magistrate is directed to issue an order setting an appropriate schedule for the submission and consideration of the motion, pursuant to Local Rule 54.3(b).

Remittitur

Finally, the defendants move for remittitur. The review of a jury award by a federal district court is a question of federal law. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 488 U.S. 980 (1989). This Court recognizes that remittitur is only to be granted when a jury's verdict is so grossly excessive as to shock the conscience of the court. *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1062 (8th Cir. 1993); *Ouachita Nat'l Bank v. Tosco Corp.*, 716 F.2d 485, 488 (8th Cir. 1983). The Court is "guided by the law of the forum state in weighing the excessiveness of the verdict." *American Business Interiors, Inc. v. Haworth, Inc.*, 798 F.2d 1135, 1146 (8th Cir. 1986). Minnesota's law on the issue of lost profits damages is delineated above. With all of these

factors in mind, the Court finds that remittitur is appropriate here.

Real estate development, by its very nature, involves entrepreneurial enterprise and market risk. On the evidence presented, the jury could, and did, find that the defendants' actions constituted a breach of the development contract. The jury further found that defendants' actions injured LSGI's reputation in the market-place. The Court has concluded that the jury's verdict was not based upon speculation or conjecture.

This Court, however, is not blind to the enormous sum awarded. This is a liability which will ultimately fall upon the community's individual citizens and taxpayers. Unlike a private action between individual parties, the burden will fall not on the official wrongdoers, but on a populace which was only tangentially involved in the decision-making processes. A per capita tax of $85, even for wrongful acts of elected officials, shocks the conscience of the Court.

The Court deems it appropriate to reduce the contract and due process awards by approximately 45%. The Court directs a remittitur of the remaining damages award of $31,079,935, to $17,280,000.

Based on the files, records, and proceedings herein, and for the reasons set forth above, IT IS ORDERED that:

1. Defendants' motion for judgment as a matter of law is denied.

2. Defendants' motion for a new trial is denied.

3. Defendants' motion for cancellation of the Notice of Lis Pendens is granted.

4. The jury's award of out-of-pocket expenses is vacated, and the judgment shall be reduced by $3,239,804.

5. Plaintiff's motion for attorneys' fees is referred to the magistrate for report and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B).

6. Defendants' motion for remittitur is granted. The damages award of $31,079,935 shall be reduced by approximately 45% to $17,280,000.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 21, 1993

/s/ James M. Rosenbaum
JAMES M. ROSENBAUM
United States District Judge

APPENDIX D

[Filed July 19, 1990]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civ. 3-89-372

LA SOCIETE GENERALE IMMOBILIERE,
a French corporation, and LSGI, INC.,
a Delaware corporation,
Plaintiffs,

vs.

THE MINNEAPOLIS COMMUNITY DEVELOPMENT
AGENCY, and THE CITY OF MINNEAPOLIS,
Defendants.

MEMORANDUM AND ORDER

INTRODUCTION

This is a diversity action alleging a 1983 violation, breach of contract and tortious interference with contract arising out of the termination of a contract entered into between the parties to redevelop Nicollet Mall. Plaintiffs move for summary judgment as to liability, and defendants move for summary judgment as to each count of plaintiffs' Amended Complaint and for partial summary judgment as to liability on defendants' counterclaim. For the reasons below, all motions are denied.

BACKGROUND

Plaintiffs include La Societe Generale Immobiliere, a French corporation, and its American affiliate, LSGI, Inc., a Delaware corporation. Defendants include the Minneapolis Community Development Agency (MCDA) and the City of Minneapolis (City).

In the summer of 1985 the Minneapolis City Council granted plaintiffs exclusive negotiation rights to develop a retail shopping center on Nicollet Mall to compete with the proposed Bloomington "Mega-Mall." On February 14, 1986, the Minneapolis City Counsel passed a resolution approving certain design components of the proposed development. The resolution included language incorporating a glass atrium (or dome) over Nicollet Mall and a tunnel for bus travel underneath.[1]

On November 3, 1986, plaintiffs and defendant MCDA executed a Contract For Private Development Of Land In Minneapolis, Minnesota (Development Contract). The Development Contract required plaintiffs to procure commitments from two major anchor tenants such as Bloomingdale's, Neiman-Marcus, Saks Fifth Avenue or Nordstroms within one year.

Section 2.01 of the Development Contract states that "the MCDA acknowledges that it has received and approved those elements of the preliminary Plans attached hereto as Exhibit [E]." Those plans called for a dome and tunnel. Section 2.02 of the Development Contract states that plaintiffs agree to modify the design to ". . . comply with any and all design guidelines or any and all other requirements related to the treatment of Nicollet

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[1] The February 14, 1986, resolution provides:

1. The primary transit alternative is a tunnel under the Project between 9th and 11th Streets.

2. Covering the Mall is an acceptable design alternative if the project is stepped back and the tunnel runs only beneath it as outlined in Option 2 (Petn. No. 237590).

Mall adopted by the Minneapolis City Counsel prior to the final approval by the MCDA of the proposed Project Plans and Specifications; . . ."

Over the next year, two department stores contacted plaintiffs. On October 12, 1987, Nordstroms signed a letter wherein it acknowledged approval of a fairly detailed business proposal drafted by LSGI. Two days later, on October 14, 1987, Neiman-Marcus issued a letter expressing conditional interest in leasing space for one of its stores, pending its own independent market research and site visit.

On November 3, 1987, plaintiffs and defendant MCDA executed and closed the Development Contract. At the closing, the parties executed a "Post-Closing Agreement" to the Development Contract wherein plaintiffs agreed to secure within 30 days "further evidence reasonably satisfactory to the MCDA that the Developer has secured an additional department store besides Nordstrom, Inc. and a grocery store, as Anchor Tenants for the Project." [Post-Closing Schedule ¶ 1].

Later that same day defendant MCDA adopted a resolution, referred to as the "Cramer Resolution" after its author, directing "the City Planning Director, working in consultation with the Nicollet Mall Implementation staff, John Burg, the MCDA, and LSGI, . . . to develop design guidelines pursuant to Article II, Section 2.02 of the contract between MCDA and LSGI within 30 days which maintain the Nicollet Mall as an open, urban street with no enclosure and at-grade transportation."

In response to local newspaper articles suggesting that Nordstroms and Neiman-Marcus were surprised by the Cramer Resolution, Mayor Fraser sent separate letters to Nordstroms on November 5, 1987 and Neiman-Marcus on November 16, 1987. The letters reaffirmed the City's interest in the project and explained the process by which the City decided against doming or tunneling Nicollet Mall.

On November 18, 1987, the 614 Company sued the MCDA in state district court (614 Litigation) alleging a temporary taking of its property. Plaintiffs advised defendant City on January 28, 1988 that the 614 Litigation constituted an "unavoidable delay" as defined in the Development Contract. On July 13, 1988, plaintiffs and defendant MCDA reached an agreement, summarized in a report by Executive Director James Heltzer (the Heltzer Report), to exclude the 614 Company's property from the Project, to maintain the streets at-grade and require only one anchor tenant subject to Nordstroms' approval. The Heltzer Report was never officially executed between the parties.

On January 20, 1988, defendant MCDA issued a Notice of Default alleging that plaintiffs had failed to provide commitments of two anchor tenants. Later, on March 18, 1988, defendant MCDA granted plaintiffs an extension until April 8, 1988 to secure a second anchor tenant. Not satisfied that plaintiffs had secured a second anchor tenant, the MCDA terminated the Development Contract on June 1, 1989.

Plaintiffs subsequently filed suit in federal district court claiming violation of civil rights pursuant to 42 U.S.C. § 1983 (count 1), breach of contract (count 2), injunctive relief (count 3), tortious interference with contract (count 4), tortious interference with prospective contract (count 5), declaratory relief (count 6), declaratory relief (count 7), and specific performance (count 8). Defendants counterclaimed for breach of contract and breach of lease. Plaintiffs now move for summary judgment as to liability. In turn, defendants move for summary judgment as to each count of plaintiffs' Amended Complaint, and for partial summary judgment as to liability on defendants' counterclaim.

DISCUSSION

A. *Summary Judgment*

Summary judgment is appropriate only where there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). While summary judgment is not to be regarded as a disfavored procedural shortcut, it remains an extreme remedy. Summary judgment may only be entered "against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When reviewing the record on summary judgment, the court must view the facts in light most favorable to that party which is opposing the motion. *See Loudermill v. Dow Chemical Co.*, 863 F.2d 566, 571 (8th Cir. 1988).

B. *42 U.S.C. § 1983 Claim*

Plaintiffs' first cause of action in its Amended Complaint against the municipal defendants is based on 42 U.S.C. § 1983. Plaintiffs allege deprivation of property without due process of law. Defendants contend that a commercial contract with a municipality does not give rise to a constitutionally protected property interest, and that plaintiffs received the requisite due process.

To recover under section 1983, plaintiff must establish deprivation of a constitutionally protected right. Property rights are not created by the constitution, but from independent sources such as state law, which provide plaintiff with a legitimate claim of entitlement and not simply an expectation of property. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Here, it is a question of fact and law whether plaintiffs received a legitimate entitlement when entering into the Development Contract. It is a question of fact whether plaintiffs held

conditional or complete property rights on the issue of the design treatment of Nicollet Mall.

With respect to plaintiffs' claim that it possesses a liberty interest, it is unclear whether the defendants embarrassed or stigmatized plaintiffs or whether the Mayor impugned plaintiffs' integrity in any way. Thus, the existence of a protected property and liberty interest necessarily depends on the resolution of material fact issues, and summary judgment should not be granted to either party as to plaintiffs' 1983 claim.

C. *Tort Claims*

Minnesota recognizes causes of action for wrongful interference with both present and prospective contractual relations. *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 632 (Minn. 1982). Count four of plaintiffs' Amended Complaint alleges that defendants tortiously interfered with plaintiff's present contracts with the MCDA, Nordstrom's, Neiman-Marcus and unidentified retailers. To succeed on this count, plaintiffs must prove 1) the existence of a contract, 2) the defendants' knowledge of the contracts, 3) the defendants' intentional procurement of the breach of the contracts, 4) without justification, and 5) damages resulted therefrom. *Royal Realty Co. v. Levin*, 69 N.W.2d 667, 671 (Minn. 1955).

Plaintiffs clearly have no claim that the defendants tortiously interfered with plaintiffs' contracts with defendant MCDA, since a party to a lawsuit cannot interfere with its own contract. *See Wild v. Rarig*, 234 N.W.2d 775, 791 (Minn. 1979). Factual issues do remain, however, as to whether Nordstroms or Neiman-Marcus actually entered into enforceable contracts with plaintiffs. There are also questions of fact whether Mayor Fraser intended to interfere with the alleged contracts when he contacted Nordstroms and Neiman-Marcus by letter in November, 1987.

Count five of plaintiffs' Amended Complaint alleges that defendants interfered with plaintiffs' prospective contracts with Nordstroms, Neiman-Marcus and others. The Minnesota Supreme Court in *United Wild Rice, Inc. v. Nelson,* 313 N.W.2d 628 (Minn. 1982), adopting and quoting from the Restatement (Second) of Torts § 766B (1979), held that

> One who intentionally and improperly interferes with another's prospective contractual relation, . . . is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relations, whether the interference consists of (a) inducing . . . the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

Nelson, 313 N.W.2d at 632-33. Regardless whether this court finds the existence of a contract (since a contract is not required as an element to a claim for prospective interference), there is a factual dispute as to whether Nordstroms and Neiman-Marcus were prospective parties to contracts with plaintiffs.

Defendants move for summary judgment as to plaintiffs' tort claims based on tort immunity under Minnesota Statutes Section 466.03, subd. 6. Municipalities are immune from liability for claims based on

> the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.

Minn. Stat. § 466.03, subd. 6. Acts can be either discretionary and immune or ministerial and not immune. Previously, the test applied was whether the act was a planning or merely an operational decision. *See Berg v. City of St. Paul,* 414 N.W.2d 204, 206 (Minn.App. 1987). The Minnesota Supreme Court recently narrowed the test in *Chabot v. City of Saulk Rapids,* 422 N.W.2d 708 (Minn. 1988)

> [C]ertain government conduct is protected under the discretionary function exception not simply because it is identified as a planning decision. Rather, it is immune because the specific function involves policy-making that can be made only by the legislative or executive branch of government. *Where the policy-making involves a balancing of social, political, or economic considerations, the conduct is immune as a discretionary function.*

Id. at 710-11 (emphasis added).

Mayor Fraser's November, 1987 letters to Nordstrom and Neiman-Marcus are the only tortious acts alleged by plaintiffs. The court finds that it is a question of fact whether these letters constitute discretionary or ministerial actions on the part of the Mayor. Accordingly, summary judgment should not be granted to either party as to plaintiffs' tort claims.

D. *Breach of Contract Claim*

1. Cramer Resolution

In count two of its amended complaint, plaintiffs allege that the November 3, 1987 Cramer Resolution adopted by defendant MCDA constituted a breach of contract. Plaintiffs contend that defendant MCDA rejected the preliminary plans referred to in Section 2.01 of the Development Contract [2] when it passed the Cramer Resolution, which called for the development of design guidelines to "maintain the Nicollet Mall as an open, urban street with no enclosure and at-grade transportation." Defendants counter that when the Cramer Resolution was passed the MCDA was merely exercising its rights under Section 2.02 of the Development Contract, which reserved

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[2] In Section 2.01 the MCDA acknowledged that it "received and approved those elements of the Preliminary Plans attached hereto as Exhibit [E]." Those plans called for a dome over the project and a tunnel for bus transportation under it.

to the Minneapolis City Counsel the right to approve or reject the dome and tunnel. Clearly, a fact issue exists as to whether Section 2.02, which vests in the *Minneapolis City Counsel* the right of "final design approval of the project's treatment of the Nicollet Mall," applies equally to the *MCDA* which passed the Cramer Resolution.

2. Implied Covenant of Good Faith and Fair Dealing

In count two plaintiffs also contend that the defendants breached an implied covenant of good faith and fair dealing when Mayor Fraser contacted Neiman-Marcus on November 16, 1987. The letter reaffirms defendant City's interest in the project and explains the process by which the City decided against doming or tunneling Nicollet Mall. While Mayor Fraser was arguably opposed to plaintiffs' plan to dome and tunnel Nicollet Mall, there is a factual issue as to whether the Mayor cooperated or interfered when he wrote the letters to Nordstroms and Neiman-Marcus.

3. Anchor Tenants

The defendants claim that they terminated their contract with plaintiffs when the developer failed to secure two anchor tenants for the project as required. This is the basis of defendants' counterclaim for breach of contract. It is clearly a question of fact whether plaintiffs satisfactorily produced the requisite anchor tenants based on the letters received from Nordstroms (October 12, 1987) and Neiman-Marcus (October 14, 1987).

4. Unavoidable Delay

In count seven of its amended complaint, plaintiffs request a declaratory judgment that defendants breached the Development Contract by terminating it while there existed an "unavoidable delay." Unavoidable delays are defined in the Development Contract as

> Acts of God, casualties, war . . . litigation commenced by third parties (including litigation objecting to the taking of portions of the property or otherwise interfering with the ability of the developer or the MCDA to act, but excluding litigation as to the value of the property taken in condemnation) . . .

When an unavoidable delay occurs, Section 17.08 of the Development Contract provides that the time for any party to perform "shall be extended for the period of such Unavoidable Delay."

Plaintiffs argue that the 614 Litigation interfered with its ability to attract anchor tenants and constitutes an "unavoidable delay" as defined by the Development Contract. Therefore, they argue, their obligation to procure two anchor tenants should have been suspended from November 18, 1987. Defendants, citing the deposition testimony of Robert Smith of Neiman-Marcus and Bruce Nordstrom of Nordstroms, argue that plaintiffs' filing of the 614 lawsuit did not constitute an unavoidable delay and did not interfere with plaintiffs' ability to secure anchor tenants as required by the Development Contract. Clearly, there is factual dispute here.

In addition, defendants argue that plaintiffs failed to give the MCDA written notice of unavoidable delay within 30 days of its occurrence as required by Section 17.08 of the Development Contract. The lawsuit was commenced on November 18, 1987, but the first written assertion of unavoidable delay did not occur until January 18, 1988. Plaintiffs do not dispute that they gave tardy notice. Under Minnesota law, however, a notice provision in a contract will not be enforced unless the party who is to receive notice can prove prejudice. *See St. Paul Fire & Marine Ins. Co. v. Wabash Fire. & Cas. Ins. Co.*, 264 F.Supp. 637 (D. Minn. 1967); *Reliance Insurance Company v. St. Paul Insurance Companies*, 239 N.W.2d 922 (Minn. 1986). Here, it is highly unlikely that defendants were prejudiced by plaintiffs' delay.

Accordingly, summary judgment in favor of either party should be denied as to plaintiffs' contract claims.

E. *Certificate of Authority*

Defendants further contend that plaintiffs' contract and tort claims should be dismissed for plaintiffs' failure to file the requisite certificates of authority with the State of Minnesota. Under Minnesota Statute § 303.20

> No foreign corporation *transacting business* in this state without a certificate of authority shall be permitted to maintain an action in any court in this state until such corporation shall have obtained a certificate of authority . . . .

Minn. Stat. § 303.20 (emphasis added). *See also McAninch v. Traders Nat. Bank of Kansas City*, 779 F.2d 466, 467 n.2 (8th Cir. 1985) (foreign corporation doing business in Missouri without obtaining a certificate of authority lacked capacity to sue).

Since plaintiffs admit to never filing a certificate of authority with the State of Minnesota, the sole question is whether plaintiffs were "transacting business" within Minnesota. The extent of plaintiffs' business in Minnesota was that it entered into a Development Contract, Lease and Post-Closing Agreement with defendant MCDA. Such a one-time transaction does not constitute "transacting business" by any court's definition. *See Cohn-Hall-Marr Co. v. Feinberg*, 214 Minn. 584, 8 N.W.2d 825 (1943); *E.C. Vogt, Inc. v. Ganley Bros. Co.*, 185 Minn. 442, 242 N.W. 338 (1932); *Rock Island Plow Co. v. Peterson*, 93 Minn. 356, 101 N.W. 616 (1904).

Conclusion

Based upon the files, records and proceedings herein, and upon all the briefs of counsel,

IT IS ORDERED That

1. Plaintiffs' motion for summary judgment as to liability is DENIED.

2. Defendants' motion for summary judgment as to each count of plaintiffs' Amended Complaint is DENIED.

3. Defendants' motion for partial summary judgment as to liability on defendants' counterclaim is DENIED.

Dated: July 16, 1990

/s/ Edward J. Devitt
EDWARD J. DEVITT
United States District Court

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 93-292OMNMI, 93-3123MNMI

LA SOCIETE GENERALE IMMOBILIERE,
a French corporation, and LSGI, INC.,
a Delaware corporation,
Appellees/Cross-Appellants,

vs.

THE MINNEAPOLIS COMMUNITY DEVELOPMENT
AGENCY, and THE CITY OF MINNEAPOLIS,
Appellants/Cross-Appellees.

Appeal from the United States District Court
for the District of Minnesota

MOTION FOR LEAVE TO FILE
POST-ARGUMENT MEMORANDUM

Appellees/Cross-Appellants La Societe Generale Immobiliere and LSGI, Inc. (collectively "LSGI") respectfully requests leave to file the attached Post-Argument Memorandum of Appellees/Cross-Appellants. This submission responds to an erroneous statement made by counsel for Appellants during rebuttal, to which counsel for LSGI had no opportunity to respond.

Respectfully submitted,

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May 12, 1994

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 93-292OMNMI, 93-3123MNMI

LA SOCIETE GENERALE IMMOBILIERE,
a French corporation, and LSGI, INC.,
a Delaware corporation,
Appellees/Cross-Appellants,

vs.

THE MINNEAPOLIS COMMUNITY DEVELOPMENT
AGENCY, and THE CITY OF MINNEAPOLIS,
Appellants/Cross-Appellees.

Appeal from the United States District Court
for the District of Minnesota

POST-ARGUMENT MEMORANDUM OF APPELLEES/CROSS-APPELLANTS

During the rebuttal portion of his oral argument yesterday, this Court asked counsel for Appellants to describe the effect of a possible ruling that Judges Devitt and Rosenbaum erred in not holding that the Development Contract unambiguously granted the MCDA the right, at any time during the contract year, to alter LSGI's plans for the development of Nicollet Mall. Appellants' counsel replied that in that event the judgment must be reversed. That contention, to which LSGI had no opportunity to respond, is not legally correct. LSGI files this post-argument memorandum to correct this error.

LSGI argued at trial that Appellants breached the Development Contract by preventing it from performing its obligations under the Contract, and this was the sole theory of liability submitted to the jury. *See* Brief of Appellees/Cross-Appellants at 20 (discussing Instruction No. 22). LSGI identified numerous actions taken by the City that prevented it from performing. It introduced substantial evidence, for example, that its performance was blocked by the Cramer Resolution in November, 1987. It also introduced substantial evidence that its performance was blocked by a number of actions taken by the City during the 18 months *following* the Cramer Resolution, including, *inter alia*, (1) the Mayor's oral and written statements concerning LSGI's veracity, *id.* at 10-11, 30-33; (2) the City's bad faith financial inducement to Neiman-Marcus to locate at another site, *id.* at 11-12; (3) the City's bad faith issuance of a notice of default on the same day that it approved LSGI's revised plans, *id.* at 12; and (4) the City's decision to terminate during a period of contractual "Unavoidable Delay," *id.* at 34.

The jury, on the basis of a verdict form to which Appellants did not object, *see* Post-Trial Order at 7, n.3, returned a *general* verdict in favor of LSGI on the sole theory of breach on which it was instructed—that the City prevented LSGI from performing. Because it returned a general verdict, the jury's finding of breach by the City must be affirmed if there is sufficient evidence that any *one* of the City's actions prevented LSGI from performing.

Whether the Development Contract unambiguously granted the MDCA the right, at any time during the contract year, to alter the project plans relates only to the issue of whether the Cramer Resolution—one of many adverse actions taken by the City—constituted a breach. It does not relate to whether the City's *other* bad faith actions in the subsequent 18 months *also* prevented LSGI from performing. Because the evidence that

the City's other actions prevented LSGI from performing was sufficient to support the verdict, the judgment below must be affirmed even if this Court determines that the Contract is not ambiguous.

Respectfully submitted,

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May 12, 1994

Supreme Court, U.S.
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No. 94-1901

In the

Supreme Court of the United States

October Term, 1994

LA SOCIÉTÉ GÉNÉRALE IMMOBILIÉRE
AND LSGI, INC.,

Petitioners,

v.

THE MINNEAPOLIS COMMUNITY DEVELOPMENT
AGENCY AND THE CITY OF MINNEAPOLIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a court should uphold a general verdict when it determines that none of the possible bases for the verdict supports the verdict as a matter of law.

2. Whether a court should remand a case for a new trial when it determines that none of the possible bases for the verdict supports the verdict as a matter of law.

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No. 94-1901

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

LA SOCIÉTÉ GÉNÉRALE IMMOBILIÉRE
AND LSGI, INC.,

Petitioners,

v.

THE MINNEAPOLIS COMMUNITY DEVELOPMENT
AGENCY AND THE CITY OF MINNEAPOLIS,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF IN OPPOSITION

Respondents the Minneapolis Community Development Agency and the City of Minneapolis respectfully request that this Court deny LSGI's Petition for a Writ of Certiorari seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 44 F.3d 629.

STATEMENT OF THE CASE

The facts relevant to the Court's consideration of LSGI's Petition for a Writ of Certiorari are set forth in the Eighth Circuit's opinion and are reprinted in the Appendix to the Petition at pages 2a to 9a.

ARGUMENT

This case revolved around the issue of how customized commercial contract language negotiated between a sophisticated commercial real estate developer and a multifaceted municipal government affected a dispute over how a 3 1/2 block shopping and office complex should be designed around Nicollet Mall, the street which serves as the north-south axis and retail spine of Minneapolis. When the developer was unable to accomplish even key preliminary steps to the construction of the project after 3 1/2 years, the contract was canceled, with each party blaming the other. The Eighth Circuit, reviewing a jury verdict in favor of the developer, found the verdict to be unsupported by the law or the evidence and held that the City of Minneapolis was entitled to judgment as a matter of law. The court's resolution of this case turned on uncontroversial state law contract principles applied to unique facts. Nothing about this litigation raises issues of significant legal precedent, much less national concern.

LSGI wants this Court to determine whether LSGI presented the jury with a breach of contract theory that was supported by evidence that the Eighth Circuit failed to consider. Recognizing that such a parochial issue is likely to be of little interest to the Court, LSGI attempts to disguise what it wants by claiming that this case provides a "perfect vehicle" for determining whether Griffin v. United States, 502 U.S. 46 (1991), should apply to civil cases. Pet. 11. It is

doubtful whether a case that does not discuss the question for which certiorari is sought – and that requires the Court to review the entire record below to determine whether the question even arises – is the perfect vehicle for considering the question. Even if it were, however, and the Court were inclined to step into the shoes of the Eighth Circuit and determine what evidence was presented to the jury and whether the evidence was sufficient to sustain the verdict, the Court would never reach the question of whether Griffin should apply to civil cases. First, the Eighth Circuit was right when it held that none of the evidence presented to the jury was sufficient to sustain a verdict for breach of contract. Second, and perhaps more important, Griffin simply does not apply to cases, like this one, in which the jury has been given legally erroneous instructions. Finally, the question raised by the Petition was decided long ago.

The second question proposed by LSGI likewise raises nothing for this Court to consider. It is undisputed that a civil case must be remanded when a court of appeals cannot determine whether a general verdict rests on proper or improper grounds. The Eighth Circuit always follows this rule when it is applicable. This rule was not applicable here, however, because the Eighth Circuit properly determined that the jury's verdict necessarily rested on improper grounds. Because neither of the questions presented in LSGI's Petition are raised by this case, LSGI's Petition for a Writ of Certiorari should be denied.

I. THIS CASE DOES NOT IMPLICATE GRIFFIN.

Griffin involved a defendant charged with one count of criminal conspiracy involving two separate objects: (1) conspiring to impair the efforts of the IRS and (2) conspiring to impair the efforts of the DEA. When the jury returned a

general verdict of guilty, the defendant argued that the verdict could not stand because:

> it left in doubt whether the jury had convicted her of conspiring to defraud the IRS, for which there was sufficient proof, or conspiring to defraud the DEA, for which (as the Government concedes) there was not.

Griffin, 502 U.S. at 48 (citation omitted). The Supreme Court upheld the conviction stating that "a general jury verdict [is] valid so long as it [is] legally supportable on one of the submitted grounds." Id. at 49. In so holding, the Court stated that it was not making new law, but was merely applying a common law rule that could be traced as far back as 1775. Id. at 48-50 (referring to Peake v. Oldham, 1 Cowper 275, 276, 98 Eng. Rep. 1083 (K.B. 1775)). The Court also noted that this rule was limited to cases involving only insufficiencies of proof and that verdicts in cases involving errors of law could not be upheld and that such cases instead had to be remanded for new trials. Id. at 58-60.

A. Griffin Is Inapplicable Because The Verdict Is Not Supportable On Any Of The Grounds Submitted To The Jury.

LSGI argues that the Court should grant certiorari to determine whether the rule set forth in Griffin applies to general verdicts in civil cases. Pet. (i). By its terms, however, the rule only applies when "a general jury verdict . . . [is] legally supportable on one of the submitted grounds." Griffin, 502 U.S. at 49. The Eighth Circuit expressly found that none of the grounds submitted to the jury supported the verdict. Pet. App. 22a. Thus, this Court cannot reach the question LSGI suggests is suitable for certiorari unless it reviews the

entire record below and determines that the Eighth Circuit erred when it held that none of the grounds submitted to the jury supported the verdict. A less apt situation for determining whether the rule set forth in Griffin should be extended to civil cases hardly can be imagined.[1]

Moreover, a review of the record below will show that Griffin is not implicated by this case because the Eighth Circuit was right when it concluded that the verdict was unsupported by any of the grounds submitted to the jury. Although LSGI now claims that "the case was submitted to the jury on the theory that the City's overall course of conduct, including its violations of its obligation of good faith and fair dealing, constituted a breach of contract," and that the court "totally ignored . . . substantial evidence" of the City's "other bad faith breaches in the months following November 1987 . . . which separately supported the jury's general verdict of breach," Pet. 7, 10 (emphasis in the original),[2] this simply is not true.

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[1] By way of contrast, the City notes that in Griffin the question of whether a general verdict in a criminal case should be upheld when some of the grounds submitted to the jury were unsupported by the evidence was squarely before the Court. There was no dispute that one of the two grounds submitted to the jury supported the verdict and that the other did not, and the court of appeals in Griffin expressly addressed the question of whether to uphold the verdict or remand for a new trial before the case was considered by the Supreme Court. Griffin, 502 U.S. at 47-48.

[2] The "other bad faith breaches" to which LSGI refers apparently include: (1) the issuance of a notice of default; (2) a thirty-day extension to secure two anchor tenants; (3) the City's suggestion that the Project be reduced in size; and (4) an alleged subsidy given to Bell Canada Development. Pet. 5-7.

LSGI also makes a vague reference to breaches of Projects 2 and 3. Pet. 10. At trial, LSGI argued that its negotiations in 1988 and 1989 regarding a smaller project resulted in a contract that the City breached. The trial court granted the City's motion for a directed verdict on this issue, however, and LSGI did not appeal this issue to the Eighth Circuit. Thus, this issue is not properly before this Court. See, e.g., Delta Air Lines, Inc. v. August, 450 U.S.

The Eighth Circuit, which had all of the evidence before it, including the evidence relating to the events LSGI now claims were part of a single breach of contract theory, "analyze[d] the evidence in the light most favorable to" LSGI and found that LSGI had submitted three independent theories of breach of contract to the jury – the Cramer Resolution, breach of an implied covenant of good faith, and unavoidable delay. Id. 9a-11a, 14a-18a.[3] The court considered each theory in turn and found each to be insufficient as a matter of law. Id. 9a-21a.[4] In so finding, the court did not ignore

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346, 362 (1981); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970). To the extent LSGI's reference to Projects 2 and 3 is intended to refer to something else, the City has no understanding of what LSGI means.

[3] LSGI admitted that it argued three independent theories of breach of contract to the jury – and not one as it now claims – while opposing the City's post-trial motions:

> LSGI alleged and argued at least three independent theories of breach of contract. First, it alleged, argued and proved that the MCDA breached . . . the Development Contract by adopting the November 3, 1987 "Cramer Resolution" . . . . Second, LSGI alleged, argued and proved that Defendants, through their entire course of conduct, and in particular M[illegible]or Fraser's letters to Nordstroms and Neiman Marcus, breache[illegible] implied covenant of good faith and fair dealing. Third, LSGI alleged, argued and proved that Defendants breached the Contract by terminating it during a period of "unavoidable delay" as defined by the Contract.

Plaintiffs' Memorandum in Opposition to Defendants' Motion for Judgment Notwithstanding the Verdict or New Trial or Remittitur, at 6 (included in the appendix the City filed with the Eighth Circuit at A-712).

[4] As regards the Cramer Resolution, the court held that the Development Agreement was unambiguous and expressly gave the City Council the right to reject LSGI's dome and tunnel concept. Pet. App. at 9a-14a. The court then held that the exercise of a contractual right cannot be a breach of contract, as a matter of law. Id. at 14a. The court also held that the right was not lost by the mere passage of time and that the City Council could

evidence of post-November 1987 events as LSGI claims, but carefully examined all of the factual underpinnings of LSGI's case, expressly mentioning at least three of the four events upon which LSGI now seeks to rely – the notice of default, the thirty-day extension, and the City's suggestion that the size of the Project be reduced. Pet. App. 7a-8a.[5]

Thus, LSGI's claim that the Eighth Circuit "totally ignored . . . substantial evidence" of other breaches is nothing more than a disagreement with the Eighth Circuit's choice of what facts to emphasize in its opinion. A court is not obligated, however, to mention every piece of evidence when writing an opinion. See, e.g., McIntosh v. Weinberger, 810 F.2d 1411, 1429-30 (8th Cir. 1987) ("The Court is not required to render specific findings with respect to every item of evidence presented to it."), vacated on other grounds sub nom. Turner v. McIntosh, 487 U.S. 1212 (1988); Straight v. Wainwright, 772 F.2d 674, 678-79 (11th Cir. 1985) (mere fact that opinion did not discuss all of the evidence does not indicate that court did not consider all of the evidence), cert. denied, 475 U.S. 1099 (1986) and 476 U.S. 1130 (1986); Gulf King Shrimp Co. v. Wirtz, 407 F.2d 508, 515-16 (5th Cir. 1969) ("Courts need not indulge in exegetics, or parse or

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exercise the right while sitting as the MCDA Board. Id. at 15a. As regards the implied covenant of good faith and fair dealing, the court focused on the events primarily relied upon by LSGI – the Mayor's statements – and held that they were not unjustifiable as a matter of law and thus did not constitute a breach of contract. Id. at 15a-18a. The court also held that the Mayor's statements were not a breach of contract because there was no evidence that the Mayor's statements had hindered LSGI's performance. Id. at 16a-18a. As regards unavoidable delay, the court held that the provision requiring notification of unavoidable delays within thirty days of their commencement was enforceable and that LSGI's nonperformance was not excused because it had failed to comply with this provision. Id. at 18a-21a.

[5] The Eighth Circuit noted the suggestion regarding the size of the project when it referred to the MCDA's letter dated May 11, 1988 and the subsequent negotiations that lasted until May 1989. Pet. App. 8a.

declaim every fact and each nuance and hypothesis.").[6] Further, because the Eighth Circuit focused on the facts LSGI itself relied upon and emphasized – the Cramer Resolution, the Mayor's statements, and unavoidable delay – the Eighth Circuit can hardly be faulted for its choices. See supra at 6 n.3.[7] To the extent LSGI continues to claim that it relied upon other events at trial, however, the Eighth Circuit must be presumed to have found that they did not support the jury's verdict. See, e.g., In re Texas Mortgage Servs. Corp., 761 F.2d 1068, 1075 n.12 (5th Cir. 1985) ("If a trial judge fails to make a specific finding on a particular fact, the reviewing court may assume that the court impliedly made a finding consistent with his general holding so long as the implied finding is supported by the evidence."); Swanson & Youngdale, Inc. v. Seagrave Corp., 561 F.2d 171, 173-74 & n.5 (8th Cir. 1977); Clinkenbeard v. Central Southwest Oil Corp., 526 F.2d 649, 651-52 (5th Cir. 1976); Burkhard v.

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[6] One commentator has noted:

> No one would contend that every consideration that influences a judge toward agreement with a result announced ought invariably to be included in the opinion. Some motivations are negligible, some never become explicit, and some may better be left unmentioned. The urge to do justice in the particular case does not demand detailed explanation, when doing justice does not disrupt existing principle and theory.

Leflar, Some Observations Concerning Judicial Opinions, 61 Colum. L. Rev. 810, 818 (1961).

[7] This is particularly true because the first time LSGI identified specific events other than the Cramer Resolution, the Mayor's statements, and unavoidable delay as possible breaches of contract was in its post-hearing memorandum. Pet. App. 51a. LSGI's attempt to file such a memorandum and the court's subsequent rejection of it merely emphasizes that LSGI did not rely upon events other than the Cramer Resolution, the Mayor's statements, or unavoidable delay at trial.

Burkhard, 175 F.2d 593, 596 (10th Cir. 1948).[8] Thus, there are no theories or events that the Eighth Circuit failed to address that are capable of supporting the jury's verdict, and the question of whether the rule set forth in Griffin should be applied to civil cases simply does not arise.

B. Griffin Is Inapplicable Because The Jury Was Given Legally Erroneous Instructions.

Even if the Supreme Court were interested in reviewing the record to determine whether the Eighth Circuit somehow misconstrued LSGI's theory of breach of contract or overlooked a fact upon which LSGI relied, and were to determine that the jury's verdict was supported by the evidence, the Court would not reach the question LSGI claims is appropriate for certiorari because the rule set forth in Griffin does not apply here. As previously noted, the rule is limited to cases involving legally sound but factually insufficient theories. Consequently, Griffin does not apply when the jury has been presented with a legally unsound theory and been given a legally erroneous jury instruction. See supra at 4.[9] Because

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[8] This presumption is supported by the fact that, as a matter of law, none of the additional events identified by LSGI constitute a breach of contract. Three of the events – the issuance of a notice of default, a thirty-day extension to secure two anchor tenants, and the City's suggestion that the size of the project be reduced – involved the exercise of contractual rights, which the Eighth Circuit expressly held (while discussing the Cramer Resolution) could not be a breach of contract, as a matter of law. Pet. App. 14. The fourth – the alleged subsidy to Bell Canada – presumably would have been part of LSGI's tortious interference claims, which the jury rejected, finding the City's actions not to be wrongful. Verdict, questions 7-8 (included in the appendix the City filed with the Eighth Circuit at A-710).

[9] LSGI admits as much when it describes Griffin as holding that "[s]o long as one of the bases for a general verdict has sufficient evidentiary support and the jury has not been given a legally erroneous instructions, the general verdict must be affirmed." Pet. 12 (emphasis added).

the jury in this case was allowed to consider legally unsound theories and was given legally erroneous jury instructions, this case does not implicate Griffin.

The trial court's most glaring error was its determination that the Development Agreement was ambiguous. This error resulted in the court instructing the jury that interpretation of the Development Agreement was to be left to the jury as a question of fact, which in turn allowed the jury to consider whether the Cramer Resolution or the Mayor's statements breached the Development Agreement. The Eighth Circuit, however, correctly held that the Development Agreement was unambiguous and that its interpretation was a question of law for the court. Pet. App. 9a-14a. The Eighth Circuit also held that, when the Development Agreement was interpreted correctly, neither the Cramer Resolution nor the Mayor's statements constituted a breach of contract, as a matter of law. Id. at 9a-18a.

Another major error was the trial court's instruction to the jury that the jury should decide, as a question of fact, whether LSGI had "reasonably complied" with the provisions in the Development Agreement regarding unavoidable delay. This error allowed the jury to consider whether LSGI's obligations had been excused by an unavoidable delay. The Eighth Circuit, however, held as a matter of law that LSGI's obligations were not excused because LSGI had failed to provide the notice required by the Development Agreement. Id. at 18a-21a.

It is indisputable, therefore, that the trial court made errors of law that resulted in the jury being given erroneous instructions and allowed the jury to consider legally erroneous theories. Because the rule set forth in Griffin does not apply to cases involving legally insufficient theories and erroneous jury instructions, the rule cannot apply here. Thus, granting

certiorari in this case to determine whether the rule set forth in Griffin should apply in civil cases would be pointless.[10]

II. THE EIGHTH CIRCUIT'S DECISION TO REVERSE DOES NOT CONFLICT WITH THE GENERAL RULE IN CIVIL CASES THAT VERDICTS THAT MAY BE BASED ON IMPROPER GROUNDS SHOULD BE REMANDED FOR A NEW TRIAL.

As an alternative ground for granting certiorari, LSGI argues that the Eighth Circuit's decision "conflicts with the decisions of several courts of appeals holding that general verdicts possibly based on improper grounds, whether legal or factual, at a minimum should be remanded for retrial." Pet. 14-15. No one disputes, however, that remand is required in a civil case when it is impossible to determine whether a jury's

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[10] The City notes that LSGI's Petition also should be denied because the question it raises has already been decided and is a matter of settled law. In Wilmington Star Mining Co. v. Fulton, 205 U.S. 60 (1907), the Supreme Court held that a civil case involving a general verdict must be remanded when an appellate court is unable to determine whether the verdict rested on sufficient or insufficient grounds. Id. at 78-79. In so doing, the Court expressly noted that the common law rule applicable to criminal cases – the rule the Court applied in Griffin – did not apply to civil cases.

> And of course, in a case like the one we are considering, we cannot maintain the verdict, as might be done in a criminal case, upon a general verdict of guilty upon all the counts of an indictment.

Id. (citation omitted). Fulton has been consistently followed by the federal courts of appeal for almost ninety years. See, e.g., Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark, 39 F.3d 812, 818-21 (7th Cir. 1994), cert. denied, 1995 WL 156498 (U.S. May 15, 1995); Virtual Maintenance, Inc. v. Prime Computer, Inc., 11 F.3d 660, 667 (6th Cir. 1993), cert. dismissed, 114 S.Ct. 2700 (1994); Ely v. Blevins, 706 F.2d 479, 480-81 (4th Cir. 1983); Murphy v. United States, 653 F.2d 637, 646 (D.C. Cir. 1981).

verdict rests on proper or improper grounds. This is the rule set out by the Supreme Court in Wilmington Star Mining Co. v. Fulton, 205 U.S. 60 (1907). See supra at 11 n.10. It also is a rule the Eighth Circuit has followed time and again. See, e.g., Todd Farm Corp. v. Navistar Int'l Corp., 835 F.2d 1253, 1257 (8th Cir. 1987); Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1236-37 (8th Cir. 1987), cert. denied, 484 U.S. 1026 (1988); Dudley v. Dittmer, 795 F.2d 669, 673 (8th Cir. 1986) ("The rule in this circuit is clear that when one of two theories has erroneously been submitted to the jury, a general verdict cannot stand."). Moreover, it is a rule the City expressly asked the Eighth Circuit to apply if it found only one or two of LSGI's three breach of contract theories to be insufficient. Appellants' Brief, at 12 (stating that "if this Court were to find that only one theory was submitted in error, it must order a new trial"). Thus, there is no question that the Eighth Circuit was aware of the rule when it decided this case.

LSGI's suggestion that the court rejected the rule sub silentio and created a circuit split is simply ridiculous. The court did not reject the rule; it merely found – after considering each of the possible bases for the jury's finding of breach of contract and finding each basis to be insufficient as a matter of law – that the rule did not apply because the verdict rested on improper grounds. Pet. App. 22a. In such an instance, reversal without remand is entirely proper. See, e.g., Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 327 (1967) (When "[t]here are . . . dispositive issues of law which, if resolved in the defendant's favor, must necessarily terminate the litigation . . . there can be no reason whatsoever to prevent the court of appeals from ordering . . . the entry of judgment for the defendant."). The Eighth Circuit's opinion in this case, therefore, did not create a circuit split or conflict with

Supreme Court authority.[11] Consequently, there is no reason to grant certiorari.

[11] For the same reason, the Eighth Circuit's opinion did not create a "perverse rule" that general verdicts in favor of plaintiffs will be reversed without remand whenever "the defendant can demonstrate that any one of the several grounds presented to the jury by the plaintiff was factually insufficient." Pet. 16. The Eighth Circuit found all of the grounds presented to the jury insufficient as a matter of law. Pet. App. 22a.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied. Respectfully submitted,

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IN THE
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OCTOBER TERM, 1995

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and THE CITY OF MINNEAPOLIS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

In its petition, LSGI demonstrated that the Eighth Circuit, in direct conflict with the approach followed by other circuits, reversed outright a general verdict despite failing to consider substantial evidence supporting that verdict. The evidence which the Eighth Circuit failed to address—relating to the City's post-November 1987 efforts to prevent LSGI from performing its obligations—was neither minor nor inconsequential. To the contrary. that evidence comprised a major portion, perhaps even the majority, of the evidence LSGI introduced at trial and upon which the jury may have relied.

Respondents do not dispute the fundamental underpinnings of LSGI's petition. In sharp contrast to their arguments before the Eighth Circuit (see, e.g., Appellants'

Reply Br. 4), Respondents do not dispute here that all other courts addressing general verdicts have held that if *any* proper ground supports a verdict, that verdict must be either affirmed or, at a minimum, remanded for a new trial, even if the jury was given a legally erroneous instruction or if some factual basis upon which the jury may have relied is found to be insufficient. See *Griffin* v. *United States,* 502 U.S. 46 (1991); see also *Dillard & Sons Constr., Inc.* v. *Burnup & Sims Comtec, Inc.*, 51 F.3d 910 (10th Cir. 1995); *Reeves* v. *Acromed Corp.*, 44 F.3d 300 (5th Cir.), *cert. denied,* 115 S. Ct. 2251 (1995). And, while they assert that the Eighth Circuit "mentioned" certain facts relevant to LSGI's post-November 1987 claims,[1] Respondents do not contest that, before reversing the general verdict in this case, the Eighth Circuit neither addressed *each* of the post-November 1987 grounds which LSGI claimed independently supported the general verdict, nor specifically found each of them legally flawed or factually insufficient.

Thus, Respondents do not dispute that the Eighth Circuit failed to engage in the specific legal and factual inquiry required by all other courts, including this Court, to address the issue. Whether a court must engage in a specific legal and factual inquiry into all grounds upon which a jury may have relied in reaching its general verdict, or whether the court may instead reverse the verdict without determining whether the jury may have relied on a proper ground, is at the core of both questions presented by the petition. That issue of federal civil procedure is neither "parochial" nor "of little in-

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[1] Opp. 7. Respondents fail to note, however, that those "mention[s]," some of which Respondents admit are obscure and indirect (*see id.* at n.5) are simply recitations in the Eighth Circuit's statement of facts. These "factual underpinnings" supporting the jury's general verdict were *never* discussed by the court. In any event, Respondents acknowledge that the court did not even "mention" all of them. *Id.* at 7.

terest"; rather, it is fundamental to the proper consideration of jury trials and general verdicts in the federal courts and, therefore, warrants this Court's review.

In claiming that this case is unworthy of review, Respondents argue that the Eighth Circuit did not abandon the rules governing general verdicts followed by the other circuits in favor of a novel and conflicting approach. They argue that the Eighth Circuit simply exercised its discretion not "to mention every piece of evidence when writing an opinion." Opp. 7. Respondents cite three circuit court opinions in support of this proposition. Each of these opinions holds that a court of appeals may, on an appropriate occasion, presume that a district court would have found a certain fact. Quite obviously, none of these opinions stands for the insupportable proposition that a court of appeals may sidestep its obligation to explore fully the factual and legal sufficiency of all grounds supporting a general verdict it ultimately reverses.

Respondents argue further that a court of appeals "must be *presumed* to have found that [the evidence which it did not address] did *not* support the jury's verdict." *Id.* at 8 (emphasis added). That presumption, however, which is necessary to reconcile the Eighth Circuit's decision with the decisions of all other courts, underscores, rather than obviates, the conflict between the Eighth Circuit and the other courts of appeals. In all other circuits, courts are affirmatively obliged to address and resolve the issue of whether *any* proper basis exists for the jury's verdict. This is a fundamental predicate for determining how to dispose of a case. Under the Eighth Circuit's approach, that fundamental inquiry is unnecessary.

Respondents' presumption likewise makes no sense. The core function of courts of appeals is to decide issues presented to them. To simply *presume* that a court has "carefully examined" (*id.* at 7) and decided an issue,

particularly one which is outcome-determinative, makes a mockery of this essential judicial function. Moreover, to presume that a court found evidence upon which a jury may have relied to be insufficient is fundamentally disrespectful of the role of the jury and at odds with the right to a trial by jury. As this Court held in *Griffin*, while jurors cannot be presumed to recognize a legally erroneous instruction, they "*are* well equipped to analyze the evidence." 502 U.S. at 59.[2]

In short, Respondents claim that the Eighth Circuit followed the same approach as other circuits. That simply is not true. In truth, the Eighth Circuit adopted an approach—and in so doing established a precedent—which is inconsistent with the constitutional right to a jury trial and which is fundamentally at odds with the approaches of all other courts of appeals and the approach of this Court in *Griffin*. Under the approach followed by all other circuits, courts of appeals faced with a flawed general verdict must affirmatively determine whether the jury relied on *any* proper ground and then determine—pursuant either to the rule of *Griffin* or to the rule of *Dillard* and *Reeves*—whether to affirm or to remand. Under the approach adopted by the Eighth Circuit, a court, relying on the presumption that evidence presented to the jury was *insufficient*, may simply reverse such a general verdict. These conflicting options

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[2] In footnote 2 of their Opposition, Respondents misleadingly claim—without a supporting citation—that the trial court granted the City a directed verdict on the "issue" of Projects 2 and 3. Opp. 5 n.2. The court, however, simply ruled that the parties had not entered into a *new* and *distinct* contract with respect to Project 3, as LSGI had argued in the alternative. Trial Tr. Vol. IX, Feb. 15, 1993, at 4-8. The trial court *never* ruled that Respondents' actions with respect to Projects 2 and 3 did not constitute breaches of the original contract. Perhaps most telling is the fact that, when confronted with the issue of Projects 2 and 3 before the Eighth Circuit on motion for rehearing, Respondents made no claim that the issue was not properly before the court. *See* City's Opp. on Mot. for Reh'g.

have and will lead to confusion in the courts of appeals. This Court should review the decision of the court below to resolve that confusion and to determine the proper approach for reviewing general verdicts.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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